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# LAW REPORTS

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## Supreme Court of Judicature.

CASES DETERMINED IN THE

# CHANCERY DIVISION

AND IN

# LUNACY,

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

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BENGAL SECRETARIAT LIBRARY

# CASES

DETERMINED BY THE

# CHANCERY DIVISION

AND IN

# LUNACY

AND ON APPEAL THEREFROM IN THE

# COURT OF APPEAL.

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## *In re* FREME.
## FREME *v.* LOGAN.

[1889 F. 372.]

C. A.
1893
*Oct.* 25.

*Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s. ii.*; *s.* 22, *sub-ss.* 2, 5; *s.* 53—*Sale of Settled Land—Application of Proceeds—Discharge of Incumbrances.*

A testator who died in 1878 devised his *W.* and *S.* estates to his son *J. F.* for life, with remainder to such of the children of *J. F.* as should attain twenty-one, and devised his residuary estate to *J. F.* absolutely. At the testator's death the *W.* estate was subject to a mortgage in fee; the *S.* estate was unincumbered. *J. F.*, in 1887, sold part of the *S.* estate under the *Settled Land Act,* 1882, and by his direction the trustees under the Act applied the money in part discharge of the mortgage on *W.* *J. F.* died intestate in 1888, leaving only infant children. It was decided after his death that the contingent remainders as to the *S.* estate failed, but that as to the *W.* estate they did not. The unsold part of the *S.* estate thus became the absolute property of the eldest son and heir-at-law of *J. F.*, who then claimed a charge on the *W.* estate for the proceeds of sale which had been applied in part discharge of the mortgage, on the ground that as the *S.* and the *W.* estate did not devolve in the same way, they were different settled estates, and capital money arising from one was not properly applied in paying off an incumbrance on the other:—

*Held,* by *North,* J., that as the money had been applied by the direction of *J. F.*, who ultimately became absolutely entitled to it, *J. F.'s* heir could not complain of the application, and was not entitled to a charge:

*Held,* on appeal, that there was only one settlement and one settled estate, and that the application, before the parts of that estate had devolved

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in different ways, of capital money arising from one part in discharging an incumbrance on another part of the estate was within the powers of the Act, and that *J. F.'s* heir was not entitled to any relief.

*WILLIAM PURSER FREME* died in 1878, having devised an estate called the *Wepre Hall* estate, a farm called *Shotton Hall Farm*, and the other property lately purchased by him from Earl *Spencer*, his house property in *Renshaw Street, Liverpool*, his five houses in *Peover Street, Liverpool*, and his ground rents in *Liverpool*, to his son *James* for his life, and after his decease to his children as he should appoint, and in default of appointment he devised the same unto and amongst "all the children of my said son *James*, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry under that age, equally between them." After giving certain annuities and making various specific and pecuniary bequests, he devised and bequeathed his residuary estate to his son *James* absolutely.

The *Wepre Hall* estate was freehold, and at the testator's death the bulk of it was subject to a mortgage in fee for £17,004 2*s.* 7*d.*, only a small part being unincumbered. The *Shotton Hall Farm* and some other property purchased from Earl *Spencer* was freehold and unincumbered. The *Liverpool* property was partly freehold and partly leasehold. The *Renshaw Street* property, freehold and leasehold, was subject to a mortgage; and some other of the *Liverpool* freeholds were subject to a mortgage in fee.

In 1883 *James Freme* paid off the money secured on the *Wepre Hall* estate, and had the mortgage assigned to *Logan*, as a trustee for him, by deed indorsed on the mortgage.

In 1887 *James Freme*, as tenant for life under the *Settled Land Act*, 1882, sold part of *Shotton Hall Farm* to a railway company for £12,196 17*s.* 6*d.* This sum was received by persons who had been appointed by the Court trustees for the purposes of the *Settled Land Act*, and by the direction of *James Freme* was applied as follows: £3626 15*s.* 9*d.* in discharge of the mortgage of the *Renshaw Street* property, and in part discharge of a mortgage on some other part of the *Liverpool* property, and £8500 in part discharge of the mortgage on the *Wepre Hall* estate, leaving a

trifling balance in hand. The freehold part of the *Renshaw Street* property was in March, 1887, reconveyed to the uses of the will. *Logan* signed the following receipt, indorsed on the *Wepre Hall* mortgage:—"I acknowledge to have this day received from" [names] "the trustees of the will of the within-named *W. P. Freme*, appointed for the purposes of the *Settled Land Act* by an order of the Chancery Division of the High Court of Justice, made, &c., the sum of £8500, being a payment out of capital moneys in their hands as such trustees as aforesaid, made at the request of the within-named *James Freme*, the present tenant for life of the lands and hereditaments within described, on account and in part discharge of the within-mentioned mortgage debt of £17,004 2*s.* 7*d.* Dated this 6th day of June, 1887."

*James Freme* died on the 21st of April, 1888, intestate, and without having exercised the power of appointment given him by his father's will. He left three children, all under age, of whom *John Rowden Freme* was the eldest, and was, therefore, his heir-at-law.

In March, 1889, the present action was commenced by the two younger children by their next friend against *Logan*, the eldest son, the trustees under the *Settled Land Act* and the personal representative of *William Purser Freme*, to have the rights of all parties ascertained. *North*, J., decided that the contingent remainders created by the will, so far as they related to so much of the *Wepre Hall* estate as was included in the mortgage, and to the freehold parts of the *Renshaw Street* property, had not failed; but that they had failed so far as related to so much of the *Wepre Hall* estate as was not included in the mortgage, and to the *Shotton Hall Farm* and the rest of the property purchased from Earl *Spencer* (1). From this decision there was no appeal.

Another important question raised was whether the £8500 applied in part satisfaction of the mortgage on the *Wepre Hall* estate, and in paying off the *Renshaw Street* mortgage, had been properly so applied, inasmuch as they arose from sale of part of an estate as to which the contingent remainders failed, and were

(1) [1891] 3 Ch. 167.

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applied in discharging incumbrances on estates in which the remainders had not failed.

It was held by Mr. Justice *North*, that as this money had been applied in discharge of mortgages by the express directions of *James Freme*, who had, in the events which had happened, become absolutely entitled to the *Shotton Hall* estate, and the proceeds of sale thereof; the heir-at-law of *James Freme* could not be heard to complain of such application.

The heir-at-law appealed from this decision. The appeal was heard on the 25th of October, 1893.

*Cozens-Hardy*, Q.C., and *Arkle*, for the appeal:—

We contend that money arising from the sale of settled land cannot be lawfully applied in discharge of incumbrances on land not settled to the same uses. Sect. 21, sub-sect. ii., of the Act only authorizes the discharge of incumbrances "affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." Here moneys arising from the sale of part of the *Shotton Hall Farm*, the contingent remainders as to which farm have failed so that it has devolved on the Appellant, have been applied in paying off mortgages on estates the contingent remainders in which are subsisting. This payment cannot alter the rights of the parties; the payment must be considered not to be an application authorized by the Act, and the money must under sect. 22, sub-sect. 5, be treated as land, and devolve on the Appellant; for by the express words of the subsection it devolves in the same way as the land from which it arose would have devolved if not sold, and the Appellant is entitled to a charge for it on the estates subject to the mortgages. Mr. Justice *North* held the payments authorized, because the tenant for life who in the event became absolute owner of the freeholds not in mortgage directed those payments; but it is quite clear from the form of the receipt in the *Wepre Hall* mortgage that he did not contemplate the possibility of his absolute ownership, and was only acting as a tenant for life. Moreover, *James Freme* was not absolute owner of the money at the time, and might never have become so. A person with a defeasible interest cannot effect a reconversion from money

into land or *vice versâ: Sisson* v. *Giles* (1); and the present question is analogous. The like language is used as to the *Renshaw Street* mortgage. The Appellant, therefore, claims a charge on the *Wepre Hall* estate and the *Renshaw Street* property for the money applied in discharge of incumbrances on those estates. The unincumbered and the incumbered estates were not subjects of the same settlement. The Court looks to the effect of the limitations to which the two properties are subject: *In re Mundy's Settled Estates* (2); *In re Byng's Settled Estates* (3). And where the estates may devolve in different ways they must be looked upon as the subjects of different settlements. This, then, was an application of money arising from the sale of settled land in payment of incumbrances on land the subject of another settlement. There never was an application of the money according to the Act, and under sect. 22, sub-sect. 5, it remains land.

[LINDLEY, L.J.:—If you say that the application of the money in paying these incumbrances was improper, your ancestor was a party to it, and how can you complain of what he authorized? You cannot be in a better position than he.]

We submit that the application was improper, and that he could have claimed to have the matter set right as soon as he found out that the payment was improper, and we contend that the Appellant has the same right.

*S. Hall*, Q.C., and *E. S. Ford*, for the Plaintiffs:—

We contend that the application of the money in discharge of these incumbrances was proper under sect. 21, sub-sect. ii. The whole estate is one settled estate, subject to one set of limitations; and the application of money arising from one part in discharge of incumbrances affecting another part is legitimate, though by a subsequent accident the two parts devolve differently. It may be that if the Court had been dealing with the money, and an objection had been taken by *James Freme* on the ground that such an application of it would prejudice him in case the contingent remainders failed, such an objection would have

(1) 3 D. J. & S. 614. (2) [1891] 1 Ch. 399.
(3) [1892] 2 Ch. 219.

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been allowed; but he did not object—he directed the application. The case is governed by *In re Duke of Marlborough's Settlement* (1), where it was held that money arising from the sale of heirlooms might be applied in discharge of incumbrances on the settled estate, although the rights of the first tenant in tail were affected by such application. This case shews that the possibility of the severance of parts of the settled property by accident does not prevent their being treated as one settled estate. We also rely on the ground taken by Mr. Justice *North*, that *James Freme*, who directed the application of the money, could not object to it as improper, and that the Appellant, who claims under him, is in no better position.

*Cozens-Hardy*, in reply:—

*In re Duke of Marlborough's Settlement* is only a decision on the construction of sect. 37, relating to heirlooms. There is no case in which it has been decided that moneys arising from the sale of settled lands can be applied in the discharge of incumbrances affecting other lands, unless those other lands are settled so as to devolve in the same way as the lands sold.

LINDLEY, L.J.:—

In this case I think the decision arrived at by Mr. Justice *North* is correct. The case is a little peculiar. We start with a will of a testator who gives certain property called *Wepre Hall, Shotton Hall,* and some houses in *Renshaw Street, Liverpool,* to his son *James* for life, and then amongst his children, as he should by deed or will appoint, and in default of appointment to those children who should attain twenty-one. Then there is in the same will a residuary devise in favour of *James* in fee. Now, stopping there for a moment, it appears to me that when you look at the *Settled Land Act*, the three properties specifically referred to—viz., the *Wepre Hall* estate, the *Shotton Hall* estate, and the *Renshaw Street* houses—form one settled estate, subject to one settlement—viz., the will. I cannot, merely because some events to which I will refer presently have happened, read that will as amounting to several settlements of

(1) 30 Ch. D. 127; 32 Ch. D. 1.

several properties. It is one settlement of one settled estate. It so happens that as to those parts of the settled property in which the legal fee was in the testator at his decease, the contingent remainders contained in the will have failed, so that one portion of the land which was intended to go to the children at twenty-one falls into the residue, and thus a portion of the settled land does not go as the testator intended it to go and supposed it would go. That is a circumstance which is peculiar in this case, but before anything of that sort had occurred, and whilst *James Freme* was tenant for life, one portion of this property—viz., a part of *Shotton Hall*—was sold, and a part of the proceeds was applied in paying off a mortgage on the *Renshaw Street* property, and the bulk of them in part payment of a mortgage on *Wepre Hall.* It is true that the latter mortgage was held by a person named *Logan* in trust for *James Freme,* and so he got the money, but he got the money as mortgagee, and not as owner of the estate that was sold. The receipt for the money applied in that part payment is before us, and shews that the parties intended to do what they supposed the *Settled Land Act* to authorize; and it appears to me that when you look at the will, and at the terms of the *Settled Land Act,* they were right in supposing that the Act did authorize it, and what they did was to apply the money in paying off and extinguishing the *Renshaw Street* mortgage, and in part payment of the *Wepre Hall* mortgage. That seems to me to be right, and I do not think that is affected by the fact to which I have alluded, that in the result the money goes not to the heir-at-law alone for his own benefit, but for the benefit of all the children who attain twenty-one; that cannot affect the construction of the *Settled Land Act.* I base my decision upon this ground rather than upon that adopted by Mr. Justice *North.* The result is the same either way. I prefer to adopt the argument of Mr. *Hall,* which, I think, is well founded, and simpler than the other. The appeal must be dismissed.

A. L. SMITH, L.J.:—

In this case I am of opinion that Mr. Justice *North's* decision is correct. The view I take is this: I read the will of the

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testator as one settlement of one settled estate. It so happens that by reason of some events which have subsequently taken place, all the land does not follow the same line of devolution, but in my judgment that does not make this devise any the less one settlement of one settled estate. Having arrived at that conclusion, the question is whether what has been done was authorized by the *Settled Land Act.* A portion of the *Shotton Hall* estate having been sold off, and the proceeds having been applied in paying off charges existing upon other portions of the settled estate, the heir-at-law of the residuary devisee, upon whom the unsold part of the *Shotton Hall* estate has devolved, now asks this Court for a charge upon the *Wepre Hall* and *Renshaw Street* estates, to make up the loss which he has sustained by reason of a portion of the *Shotton Hall* estate having been sold.

Now, what does the *Settled Land Act* say? Sect. 21 says: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, namely . . . ." Among those modes is that defined by sub-sect. ii.: "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land." That is what has been done in this case. Assuming that I am right in my premise that there is one settled estate, then the money has been applied in paying off an incumbrance affecting a portion of the settled land. When I turn to sect. 2, to see what the meaning of settled land is, I find it to be land and any estate or interest therein which is the subject of a settlement. It seems to me clear that down to this point the decision at which this Court is now arriving is correct, but Mr. *Cozens-Hardy* and his learned junior strongly pressed upon us that sect. 22, sub-sect. 5, shews that this money must go to the Appellant, because it is there said that capital money arising under this Act, while remaining uninvested or unapplied, shall devolve in the same manner as the land would have gone if it had not been sold. Now, I wish to point out that that sub-

section was necessary, for sect. 21 only applies to the application of capital money for any of the purposes therein named, and does not say what is to happen when the money is received by the trustees, and, before it is invested, remains in their hands unapplied in any of the specified modes. Sub-sect. 5 was needed to say what should be the nature of that money while it remained in the hands of the trustees uninvested and unapplied. The Appellant seems to me to be putting a strained construction on that sub-section which it will not bear, as the sub-section only relates to moneys which have not been applied in any of the modes authorized by the Act.

DAVEY, L.J.:—

I agree with my learned Brethren that this order must be affirmed, and I think that, when the question is understood, it turns really upon the construction of very few sections in the *Settled Land Act.* The most important section is the 21st, relating to the mode in which capital money may be applied. It may be applied in discharge of incumbrances or in purchase or redemption of incumbrances affecting the settled land. Now, the question is what is the settled land in this case? My Lord asked the learned counsel who argued for the Appellant, whether he said that the application of money arising from the sale in payment off of these incumbrances was right or wrong, and he was constrained to say that it was wrong, and he said it was wrong because the land affected by the incumbrance which was paid off or discharged was not part of the settled land. The question, therefore, must be answered whether it was part of the settled land, and, in my opinion, it was. It appears to me to be a fallacy to say that there is more than one settlement. There is one settlement, it may be of many properties, all given by the same instrument and in the same identical words, and to say that that is not one settlement seems to me to be an entire fallacy. It is urged that it is not one settlement, because, owing to the technical rules relating to contingent remainders part of it goes, in the events which have happened, in one way and part goes in another; but that does not seem to me in any way to affect the settlement created by the will or to

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make it otherwise than one settlement for the purposes of the *Settled Land Act*, and, therefore, I think that the money was applied in discharge of an incumbrance on part of the "settled land," within the meaning of that section. If that is so, then Mr. *Hall's* argument is unanswerable, and what was done was perfectly right. It was within the power of the tenant for life, and he could only be attacked in the way in which the acts of a tenant for life are sometimes attacked by saying that he had committed a breach of trust, or saying that he did not have due regard to the interests of all the persons entitled under the settlement. Any case of that kind could not be made by himself, and the person whom we have now before us complaining of the act of the tenant for life, claims under the tenant for life. He is the heir-at-law of the previous tenant for life and he can stand in no better position than the tenant for life himself would stand if he were now before us. I think if this view were not sound and if the view of the learned counsel for the Appellant were sound that the money was not duly applied by the tenant for life, and that the incumbrance paid off was not an incumbrance affecting the settled land—even if that were so, to my mind the result would be the same, because then it would be a breach of trust for which the tenant for life himself would be responsible, and neither he nor any one claiming under him as a volunteer, could be heard to complain of the act of the tenant for life himself. I prefer, with the other members of the Court, to put my decision upon the ground that the application was a right application. If so there is an end of the matter, because it cannot be denied that it was not an investment. What the Act speaks of is an application in discharge of incumbrances and not an investment effected on a transfer of incumbrances. I observe that the language of the Act has been followed by the parties, for the receipt on the mortgage deed of the *Wepre Hall* mortgage expresses that the money is paid in part discharge of the principal sum due, and there is similar language in the reconveyance of the *Renshaw Street* property, so that there cannot be any doubt about the intention of the parties, or that there was an intention to extinguish the debt for all purposes, and I cannot see anything shocking in that. The tenant for life may very well have

thought that it was for the benefit of all the family that those incumbrances should be paid off although (as the event proved) at his own expense.

On these grounds, I think the judgment of the Court below should be affirmed.

Solicitors: *Field, Roscoe, & Co.*, agents for *Gibbons & Arkle, Liverpool; Patersons, Snow, Bloxam, & Kinder.*

H. C. J.

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[1892 P. 3084.]

*Covenants for Title—Incumbrance—Defect of Title appearing in the Conveyance.*

*A. P.* agreed with a railway company for the sale to them in fee of land to which she derived title under the will of *X.*, and whether she could make a good title depended on the construction of that will. The sale was completed by a deed which fully recited the will of *X.*, and by which she conveyed the land in the same way as an owner in fee would have done, and entered into the usual covenants for title extending to the acts of *X.* as well as of herself. The purchase-money was paid to her. After her death her children claiming under the will of *X.* obtained judgment against the railway company for payment to them of the purchase-money which had been paid to her. The company then sued the representatives of *A. P.* under her covenant for title:—

*Held* (overruling *Hunt* v. *White* (1), by which *Romer*, J., had considered himself bound), that defects of title to the estate expressed to be conveyed by a purchase-deed, if they come within the terms of the covenants for title, are not to be excluded from their operation on the ground that they appear on the face of the conveyance or are otherwise known to the purchaser:—

*Held*, therefore, that the company were entitled to recover on the covenants.

*ANN PALMER*, by will dated the 19th of January, 1852, bequeathed to her daughter *Amy Page*, wife of *Joseph Page*, the sum of £60 already paid into Court by the *Oxford, Worcester, and Wolverhampton Railway Company* on account of a small quantity of land part of the "*Little Piece*" proposed to be taken by the company, "and all sums of money which shall hereafter be paid by the company or any other railway company in respect to any

(1) 37 L. J. (Ch.) 326; 16 W. R. 478.

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part of the said *Little Piece* taken for railway purposes," and subject thereto she devised the *Little Piece* and some other land to *Amy Page* for life, with remainder to her children living at the death of the testatrix as tenants in common in fee.

The testatrix died in April, 1855. She was at her death seized in fee of the *Little Piece* except the part which had been taken by the *Oxford, Worcester, and Wolverhampton Railway Company*. *Amy Page* had three children living at the death of the testatrix.

In 1856 *Amy Page* and her husband and children mortgaged the *Little Piece* in fee for £2000, and in 1857 made a further charge of £200. On the 14th of July, 1860, these securities were transferred to *J. Hazlehurst, A. P. Shelley*, and *T. F. Hazlehurst.*

*Joseph Page* afterwards died, and in 1879 *Amy Page* contracted to sell the *Little Piece* to the *Midland Railway Company* for £5250.

This sale was carried out by an indenture dated the 26th of June, 1879, made between the transferees of the mortgages of the first part, *Amy Page* of the second part, and the company of the third part. This indenture recited the will of *Ann Palmer* in substantially the same terms as above, the mortgage, the further charge, the transfer, and the death of *Joseph Page.* Then after stating that the company requiring, and by the *Midland Railway Company (New Works) Act*, 1877, being empowered to take and purchase for the purposes of the railway and works thereby authorised the piece of land and hereditaments thereinafter described, being the piece of land called *The Little Piece*, "entered into an agreement with the said *Amy Page* for the purchase thereof for an estate of inheritance in fee simple in possession free from incumbrances at the price of £5250, such sum to include compensation for damage done to the adjoining hereditaments as hereafter expressed," and that £2200 remained due on the mortgages, and that it had been agreed that this sum should be paid out of the purchase-money. It was witnessed that in pursuance of the said agreements, and in consideration of £2200 paid to the parties of the first part in manner therein mentioned and also "in consideration of the sum of £3050 to the said

*Amy Page* paid by the said company on or before the execution of these presents," the incumbrancers, by the direction of *Amy Page*, granted and released, "and she, the said *Amy Page*, doth hereby grant and confirm" to the company, their successors and assigns, the piece of land in question, "and all such estate, right, title, and interest in and to the same as the said *J. Hazlehurst, A. P. Shelley, T. F. Hazlehurst*, and *Amy Page*, or either of them are or is or shall become seized or possessed of, or are or is by the said Act or otherwise empowered to convey," to hold the same unto and to the use of the company, their successors and assigns. *Amy Page* for herself, her heirs, executors, and administrators, covenanted with the company as follows:—

"That notwithstanding any act or thing by the said *Amy Page* or the said *Ann Palmer* deceased, or any of her ancestors or testators, or any of them, made, done or executed or knowingly suffered, the said *J. Hazlehurst, A. P. Shelley*, and *T. F. Hazlehurst*, or some or one of them now have or hath good right and full power to grant and release, and the said *Amy Page* now hath good power to grant and confirm, the said hereditaments and premises hereinbefore expressed to be granted or otherwise assured to the use of the said company, their successors and assigns in manner aforesaid; and that the same hereditaments and premises shall at all times hereafter remain and be to the use of the said company, their successors and assigns, and be quietly entered into and upon, and held, occupied, and enjoyed, and the rents and profits thereof received and taken, by the said company their successors and assigns accordingly, without any lawful interruption by the said *Amy Page*, or any person lawfully or equitably claiming by, from, under, or in trust for her, or by, from, or under the said *Ann Palmer* deceased, or by, from, or under any of her ancestors or testators, or any of them. And that free and discharged or otherwise by the said *Amy Page*, her heirs, executors, or administrators sufficiently indemnified from and against all estates, incumbrances, claims and demands whatsoever, either already or hereafter to be made, occasioned, or suffered by the said *Amy Page* or any person lawfully or equitably claiming by, from, under, or in trust for her, or by, from, or under the said *Ann Palmer* deceased, or by, from, or under any

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of her ancestors or testators, or any of them." Then followed a covenant for further assurance.

On the same day *Joseph Page*, the younger, a son of *Amy Page*, signed and gave to the company a memorandum by which, in consideration of the company having at his request completed the purchase and paid to *Amy Page* the purchase-money after satisfying the mortgage, he agreed to hold harmless and keep indemnified the company from all damages, costs, charges, and expenses which they might sustain or be put to by reason of any claims or demands made by any children or other issue of *Amy Page* by reason of the purchase-money having been so paid to her.

*Amy Page* died on the 27th of July, 1891.

In 1892 the Plaintiffs, who were the children and devisees and legal personal representatives of *William P. Page*, the eldest son of *Amy Page*, commenced this action against the *Midland Railway Company*, claiming to recover possession of one undivided third share of the *Little Piece*, or, in the alternative, payment to them by the company of one-third of the £3050 paid by the company to *Amy Page*. By their statement of claim the Plaintiffs stated that they were willing to allow the purchase to stand on payment to them of one-third of the £3050.

The company, by their defence, insisted that the conveyance of the 26th of June, 1879, gave them a good title. They, by leave of the Court, served a third-party notice on the executors of *Amy Page* that they claimed to be indemnified out of her estate by virtue of her covenants for title, and a notice on *Joseph Page*, the younger, that they claimed to be indemnified by him under his agreement. The parties to whom notice was given appeared, and leave was given them to take part in the trial.

The action was tried by Mr. Justice *Romer*, who held that the company were liable to pay to the Plaintiffs £1016 13*s.* 4*d.*, being one-third of the £3050, with interest and costs, and gave judgment accordingly. *Joseph Page*, the younger, was ordered to repay to the company what they should pay to the Plaintiffs, together with the costs provided for by the agreement of indemnity. As regarded the claim of the company against the executors of *Amy Page*, his Lordship considered himself bound

by *Hunt* v. *White* (1), and disallowed the claim with costs, without giving any opinion of his own.

The company presented separate appeals against that part of the judgment which made them liable to the Plaintiffs, and against that part which disallowed with costs their claim against the executors of *Amy Page*.

The first appeal turned on the construction to be put on the word "hereafter" in the will of *Ann Palmer*, and is not considered to require a report. The appeal was dismissed, thus affirming the liability of the railway company to pay the £1016 13*s.* 4*d.* The appeal from the decision in favour of the executors of *Amy Page* was then heard.

*Beale*, Q.C., and *Macnaghten*, for the appeal:—

*Hunt* v. *White* is in favour of the Respondents, and was followed by Mr. Justice *Romer*, who considered himself bound by it; but we contend that it is erroneous, and ask this Court to overrule it. The question how far covenants for title extend to defects which at the time of the covenants being entered into were known to the covenantee, has been a good deal considered by conveyancers. Mr. *Butler*, in his note *Co. Litt.* (2), says: "It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued, that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title, subject to it, and that the covenants for the title should not extend to warrant it against this particular defect." Mr. *Butler* does not, therefore, give any opinion of his own that the fact of a defect being known to the purchaser takes it out of the scope of the covenants; he recommends as a precaution that it should be mentioned in the covenants. In *Dart* on Vendors and Purchasers (3) it is observed in a note that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect; and as to defects apparent on the face of the conveyance

(1) 37 L. J. (Ch.) 326; 16 W. R. 478. (2) 384 a.
(3) 6th Ed. vol. ii. p. 886.

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he merely says they should be specified in the covenants or referred to as intended to be covered by them. This is merely *ex majore cautelâ*. No opinion is there given in support of the view taken in *Hunt* v. *White* (1), and the learned author refers to *Bythewood* and *Jarman's* Conveyancing (2), where the author says: "It is a correct, though not a new observation, that the covenants for title ought never to be relied on as affording protection against an incumbrance, of which the purchaser has notice; for it seems to be doubtful whether they would extend to such an incumbrance." This is only an expression of a doubt; and the cases to which Mr. *Jarman* refers—*Savage* v. *Whitebread* (3), *Ogilvie* v. *Foljambe* (4), and *Vane* v. *Lord Barnard* (5)—do not carry the matter any further. In *Sugden's* Vendors and Purchasers (6), again, it is said that if the purchaser consents to take a defective title, relying on the vendor's covenants, the agreement of the parties should be particularly mentioned. This, again, amounts to no more than saying that it is most prudent to do so. *Ex parte Collins* (7) there referred to only shews that constructive notice of an incumbrance will not take it out of the scope of the covenants, and that does not help in the present case. In *Davidson's* Precedents (8) is a note in which the author says that a known incumbrance should be expressly referred to in the covenants, as "it seems to be doubtful whether, in the absence of an expressed intention, the covenants for title extend to defects of which the purchaser has notice." There is, then, no settled understanding among conveyancers that the mention of a known incumbrance in covenants for title, the terms of which without such mention would include it, is necessary; the text writers only recommend its insertion as a matter of precaution. As to decisions, *Hunt* v. *White* stands alone; there is no trace of its ever having been cited in Court, and it is not referred to by any text writer, except in *Elphinstone* on Interpretation of Deeds (9), which appeared in 1885. In *Rawle* on Covenants for Title (10),

(1) 37 L. J. (Ch.) 326; 16 W. R. 478.
(2) 3rd Ed. vol. ix. p. 381.
(3) 3 Ch. Rep. 14.
(4) 3 Mer. 53, 65.
(5) Gilb. 6.
(6) 14th Ed. p. 573.
(7) 2 Ir. Ch. Rep. 618.
(8) 4th Ed. vol. ii. p. 379.
(9) Page 481.
(10) Page 116.

it appears that the American Courts have recognized the authority of *Levett* v. *Withrington* (1), which decides that mere notice to the purchaser does not bar his right to recover. Taking the case apart from authority, it is against principle that a covenant should not be construed according to its plain meaning, because of some information possessed by the parties.

*Bramwell Davis*, for *Amy Page's* executors:—

Mr. *Dart* (2) clearly shews his opinion that the covenants do not apply to defects of title which appear on the face of the conveyance. The taking a separate indemnity from *Joseph Page* tends to shew that the railway company did not rely on the covenants for title. *Butler's* note *Co. Litt.* (3) is in my favour, and the decision in *Hunt* v. *White* (4) is in point. This decision has been before the profession for twenty-five years without ever having been questioned, and the Court will not after this lapse of time overrule it.

[LINDLEY, L.J.:—I should certainly not be for overruling it if it had settled the practice, but nobody seems to have known of it.]

The sound principle appears to be that a vendor by his covenants for title warrants only that he has really such title as by the conveyance he appears to have.

*Beale*, in reply.

1893. Nov. 9. LINDLEY, L.J.:—

This is an appeal from a portion of the judgment of Mr. Justice *Romer* which decided that the *Midland Railway Company* was not entitled to any relief in respect of a covenant for title entered into by one *Amy Page* who sold some land to them.

The circumstances giving rise to the company's claim were shortly as follows. One *Ann Palmer* devised certain lands to *Amy Page*, but in such language as to render it doubtful whether she was absolutely entitled to the purchase-money paid

(1) 1 Lutw. 317.
(2) V. & P. 6th Ed. vol. ii. p. 887.
(3) 384 a.
(4) 37 L. J. (Ch.) 326; 16 W. R. 478.

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by the *Midland Railway Company*, who bought some of this land from her and took a conveyance from her in fee and paid her the price of the fee. By the deed of conveyance she entered into the usual covenants for title.

*Amy Page* died in 1891; an action was then brought by persons claiming the land under *Ann Palmer's* will upon the footing that *Amy Page* was only tenant for life, and that on her death the land vested in the Plaintiffs. The railway company contested this claim, relying on the terms of *Ann Palmer's* will, but the railway company also brought in *Amy Page's* executors as third parties, and claimed to be indemnified by them under her covenant for title in the event of its being decided that *Amy Page* was not absolutely entitled to the purchase-money.

Mr. Justice *Romer* first, and this Court afterwards, decided that *Amy Page* was not entitled to give a discharge for the purchase-money. The result of this decision was that the Plaintiffs in the action recovered the value of the land from the company. But Mr. Justice *Romer* further decided that the railway company had no remedy against *Amy Page's* representatives under her covenants for title. This is the point which we have now to determine.

Before addressing myself to this question it is important to observe that the conveyance by *Amy Page* to the company was made by her as an ordinary vendor in fee. The conveyance was not made by her under the statutory powers conferred on tenants for life by the *Lands Clauses Consolidation Act*, nor was the purchase-money paid into a bank pursuant to those sections in the same Act which apply to purchases from tenants for life and persons whose titles are doubtful. Moreover, the railway company did not by their pleadings or at the Bar claim to have acquired a good title under that statute, or contend that the Plaintiffs' remedy, if any, was for compensation under sect. 68 of the *Lands Clauses Consolidation Act*. Nor did the third parties, *Amy Page's* representatives, raise any such point. Both in the Court below and in this Court the case has been fought on different lines, and the only controversy has been respecting the true construction of *Ann Palmer's* will and the true construction and effect of *Amy Page's* conveyance to the Defendant company.

I think it necessary to call attention to these facts in order to prevent misconception as to the scope of the present decision. I say nothing on the point whether the Defendant company could or could not have defended the action brought against them on the ground that the company had obtained a good statutory title, and that the Plaintiffs' proper course was to proceed to obtain compensation under sect. 68 of the *Lands Clauses Consolidation Act*; nor do I say anything on the point whether, having regard to the *Lands Clauses Consolidation Act*, the Plaintiffs have any title to any estate or interest in the land conveyed to the company, as distinguished from a claim to compensation under sect. 68.

Mr. Justice *Romer* decided that *Amy Page's* covenant for title did not protect the company from the Plaintiffs' claim, because *Ann Palmer's* will was recited in the conveyance to the company, and because the covenant for title ought to be confined to defects in the vendor's title not shewn on the conveyance. In so deciding, Mr. Justice *Romer* followed a decision of the Vice-Chancellor *Malins* in 1868, viz. *Hunt* v. *White* (1), which he did not consider himself at liberty to depart from; and the question we have to determine is whether the principle on which that case was decided ought to be upheld or not. If that case had been generally followed as correct, I for one should not think it right now to disturb it, even if I did not approve it. But, singularly enough, the decision seems to have been lost sight of. The case does not appear ever to have been cited in Court, nor is it to be found in the text-books on real property and conveyancing which legal practitioners are in the habit of consulting. The note in Mr. *Dart's* book, Vendors and Purchasers (2), shews that eminent conveyancers, at all events, regard the principle on which the Vice-Chancellor proceeded as by no means settled. Under these circumstances this Court ought, in my opinion, to treat the question as still open, and to decide it on sound principles of construction.

To what is a vendor's covenant for title applicable? Is it to the title shewn to the purchaser? or is it to the title expressed to be conveyed to him? The answer to this question can only

(1) 37 L. J. (Ch.) 326; 16 W. R. 478. (2) 6th Ed. vol. ii. p. 886.

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be found by reading the whole conveyance, including the covenant for title. If on the true construction of the whole document the title conveyed is clear, and the covenant is so worded as to apply to the title so conveyed, then, although the recitals may shew some defect or uncertainty in the vendor's title, effect ought to be given to the words of the covenant so as to give to the purchaser the title which the deed shews he was to have. In the case supposed, there is no warrant for giving the words a more restricted meaning than that which they ordinarily bear—no warrant for qualifying the acts covenanted against by inserting "save as herein appears," or "save as shewn by the abstract," or "save as explained before the execution of this deed," or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed, or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenant. This is in accordance with ordinary rules of construction and with fair dealing. No doubt a purchaser is well advised to make the matter plain by inserting words to shew that even defects known to him are intended to be covered, and this is what conveyancers have advised for years. (See *Butler's* note to *Co. Litt.* (1), and the other works cited by the counsel for the Appellants.) But they have advised this course only as a matter of prudence and precaution. Apart from *Hunt* v. *White* (2), there is no authority for not giving effect to the clear and express words of a vendor's covenant for title simply because a defect covered by them was disclosed by a recital in the conveyance. The principle on which that case was decided is, in my opinion, manifestly unsound.

I pass now to *Amy Page's* conveyance itself. [His Lordship read the material parts of it.]

The words of the conveyance and covenant for title are quite clear and unambiguous, and the covenant clearly extends to claims by persons deriving title through *Ann Palmer*. The insertion of the words "*Ann Palmer*" in the covenant for title is, I

(1) 384 a. (2) 37 L. J. (Ch.) 326; 16 W. R. 478.

think, significant. They may, no doubt, have been put in to cover unknown acts done by her; but they are not really wanted for this purpose, and they may well have been put in to emphasize the fact that the covenant was really intended to extend to her acts in particular, as well as to those of the vendor and her other predecessors in title.

The fact that in this case the company took a separate indemnity from a third person cannot affect the construction of the vendor's covenant.

I am of opinion, therefore, that this appeal should be allowed, and that Mr. Justice *Romer's* order should be varied in accordance with the notice of appeal, except that the indemnity must be confined to the value of the land claimed by the Plaintiffs—*i.e.*, £1016 13*s.* 4*d.*, and interest from the death of the tenant for life, and not extend to the costs of the Plaintiffs which the Defendant company have been ordered to pay. Those costs could not, I apprehend, be recovered by the railway company in an action at law on the covenant.

The executors of *Amy Page* must pay the costs of the appeal and of the proceedings against them.

A. L. SMITH, L.J.:—

I have had an opportunity of reading the judgment of Lord Justice *Lindley*. I entirely agree with it, and have nothing to add.

DAVEY, L.J.:—

The question on this appeal is whether the railway company have a right, under the covenants for title contained in a conveyance to them of the 26th of June, 1879, to be indemnified by the representatives of Mrs. *Amy Page* against the claim of the Plaintiffs in the action which in the previous appeal we have held to be well founded in law. The conveyance in question is made between certain mortgagees of *Amy Page* and her husband and children of the first part, *Amy Page* of the second part, and the railway company of the third part. It contains a full recital of the will of *Ann Palmer*, under which *Amy Page* and the Plaintiffs derive title, and under which the question

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of title arises. There was, therefore, full notice on the face of the instrument of the nature and grounds of the claim made by *Amy Page* and of the title of the Plaintiffs. There is a recital of an agreement with *Amy Page* for the purchase of the land for an estate of inheritance in fee simple, free from incumbrances, but the deed contains no express recital of an intention to protect the railway company from any claim of the Plaintiffs by the covenants for title. By the operative part it is witnessed that, in consideration of £2200 paid to the mortgagees, and the further sum of £3050 paid to *Amy Page*, she and her mortgagees convey to the company in fee simple, and then follow the covenants for title. We have determined in the first appeal that *Amy Page* had no power to give the company a discharge for the purchase-money, and that the Plaintiffs, in the events which have happened, have a right to claim it against the railway company in some form of action. Under these circumstances the company claim to be indemnified by the representatives of *Amy Page* against the claim of the Plaintiffs. It may be mentioned that the company at the time of the conveyance took an indemnity from one of the beneficiaries. Now, it is not disputed on the pleadings, or by counsel at the Bar, that the claim of the Plaintiffs is "a claim or demand made by a person claiming under *Ann Palmer*," against or in respect of the lands in question, or that it is occasioned by an "act or thing made, done, or executed by *Ann Palmer*," or (in other words) that there would be a breach of the covenant if it is to be construed literally. But it is said that, assuming this to be so, we ought to construe the covenant so as not to cover any claim or demand arising out of matters appearing on the face of the conveyance. The question which we have to decide, therefore, is (assuming there would otherwise be a breach of the covenant), ought we to read into the covenant, by construction, an exception of defects of title or incumbrances appearing on the face of the instrument, or to imply the words "save as appears by these presents" or similar words. In support of the argument of the representatives of *Amy Page* a case of *Hunt* v. *White* (1), decided by Vice-Chancellor *Malins* in 1868, has been referred to, and Mr. Jus-

(1) 37 L. J. (Ch.) 326; 16 W. R. 478.

tice *Romer* felt himself bound by this authority and decided accordingly, without expressing any opinion of his own. It is conceded that there is no other authority on the point, and although it might be possible to distinguish *Hunt* v. *White* (1) in one respect, I am of opinion that the Vice-Chancellor intended to decide the case before him on general grounds. The Vice-Chancellor says (2): "If the object had been that the vendor was in all events to guarantee the purchaser's title, the covenants for title should have been extended by express words to meet that case;" and further on, "The covenant for quiet enjoyment can only extend to protect the purchaser from incumbrances and defects in the title of which the purchaser has no notice;" and he concludes his judgment, "Where the title is made under a written instrument, the purchaser must put his construction upon the instrument, and must be bound thereby. It would be a perversion of law to say that the covenant extended to cover such a case as this—viz., the misconstruction by the purchaser of a written instrument under which he takes his title and conveyance." The Vice-Chancellor was himself a conveyancer of considerable experience, and his opinion upon such a point is entitled to the highest respect. But still it is only the learned Judge's opinion, and we are bound to express our opinion whether we agree with it. The Vice-Chancellor's proposition is certainly expressed too widely, for where the defect of title is one of which the purchaser has notice, though it does not appear on the face of the conveyance, it was held in *Levett* v. *Withrington* (3), that notice of the defect in title relied on as a breach, is no defence to an action on the covenant in respect of the breach. And, indeed, I adopt the statement of the learned editors of *Dart* on Vendors and Purchasers (4), and it would, in my opinion, be contrary to principle to hold that the construction or effect of a covenant can be controlled by extrinsic evidence of notice or intention. The Vice-Chancellor's opinion, however, seems to be based on the fact of notice independently of the source from which it is derived. Various opinions of text-writers on Conveyancing were referred to in the course of

(1) 37 L. J. (Ch.) 326; 16 W. R. 478.
(2) 37 L. J. (Ch.) 327.
(3) 1 Lutw. 317.
(4) 6th Ed. vol. ii. p. 886.

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the argument, the most important of which is Mr. *Butler's* note to *Co. Litt.* (1). [His Lordship read the passage cited above.] It does not appear to me that this passage or the passages read from the other works, really assist the Court, as they seem to me to amount to nothing more than a salutary caution by the learned authors to the practitioner; and I agree with the note (*g*) in *Dart* (2). Looking at the question therefore, unfettered by binding authority, I am of opinion that it is safer and more consistent with principle, to construe the covenant literally without importing into it any exception or qualifications which the parties have not themselves introduced by express words; and to say, that if the parties do not intend the covenant to be so construed for the protection of the purchaser, they should express their intention, instead of throwing upon those who maintain that the covenant should be read according to the ordinary use of language, the onus of finding an expressed intention to that effect. I may add, that I think this construction is at least as likely to be in accordance with the intention of the parties as the construction contended for at the Bar. I am, therefore, of opinion, that the general rule laid down in *Hunt* v. *White* (3) cannot be supported, and, notwithstanding that the case has been in the books for twenty-five years, I think we ought not to follow it. It is not even referred to in *Dart* (4). It does not appear to have been extensively known, and I cannot conceive that any titles depend upon it.

The result will be that the claim of the railway company against the representatives of *Amy Page*, ought, in our opinion, to succeed; and we must reverse the judgment, though I do not know that we are differing from the opinion of the learned Judge in the Court below.

Solicitors for Appellants: *Beale & Co.*

Solicitors for Executors of *Amy Page: Timbrell & Deighton.*

(1) 384 a.
(2) V. & P. 6th Ed. vol. ii. p. 886.
(3) 37 L. J. (Ch.) 326; 16 W. R. 478.
(4) 6th Ed. (1888).

H. C. J.

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## BAILEY *v.* BARNES.

[1890 B. 3574.]

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1893
STIRLING, J.
*April* 19, 20; *May* 16.
C. A.
*Aug.* 1, 2, 7, 8; *Oct.* 30.

*Vendor and Purchaser—Constructive Notice—Purchaser of Legal Estate—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-s.* 2—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1.

*J.*, the owner of four freehold houses, mortgaged them in fee for £1500 each. The mortgagees transferred their mortgage to *B.* in consideration of the principal and interest then due, amounting to £1579 1*s.* 5*d.* on each house. Two days afterwards *B.* sold the houses to *H. M.* for exactly the same sum as he paid for the transfer to himself, and conveyed them to *H. M.* in exercise of the power of sale in the mortgages, freed from the equity of redemption. *H. M.* soon afterwards mortgaged the four houses for £6000, and on her death her successor in title, *E. M.*, sold the equity of redemption to *L.* for £2500, subject to the prior mortgage for £6000. Certain creditors of *J.*, the original owner, who had recovered judgment in an action against him, and obtained equitable execution on his equity of redemption, brought an action against *B.* and *E. M.*, impeaching the validity of the sale to *H. M.*, and obtained judgment setting it aside as a fraudulent execution of the power of sale, and declaring the Plaintiffs entitled to a right of redemption. *L.* was not a party to the action, but on receiving notice of it he paid off the mortgage for £6000, and took a conveyance of the legal estate from the mortgagees. At the time when *L.* purchased the equity of redemption from *E. M.*, he had no actual notice of any impropriety in the sale by *B.* to *H. M.*, nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to shew that the purchase by *H. M.* was at an undervalue, nor did he make any inquiries concerning the circumstances of the sale:—

*Held* (affirming the decision of *Stirling*, J.), that *L.* was not affected by constructive notice of the impropriety of the sale, and that he was protected against the prior equitable interest of the Plaintiffs by his acquisition of the legal estate.

By four deeds, dated respectively the 12th of May, 1888, four houses, being Nos. 11, 12, 13, and 14, *Salisbury Pavement, Putney*, were conveyed to *Charles Johnson* in fee.

By three deeds, dated respectively the 14th of May, 1888, *Johnson* conveyed the houses, Nos. 12, 13, and 14, to *L. S. Bristowe* and *C. Robbins* in fee, by way of mortgage for securing on each house £1500 and interest, and by a deed dated the 14th of June, 1888, *Johnson* conveyed No. 11 to *C. H. Foss*,

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*J. R. Sowray*, and *C. Robbins* in fee, by way of mortgage for securing a like sum of £1500 and interest.

On the 28th of January, 1889, the Plaintiffs, *F. Bailey*, *D. Bailey*, and *W. S. Marner*, recovered judgment against *Johnson* in an action for a debt and costs, amounting together to £1314 15*s.* 3*d.*, and on the 16th of March following, they obtained an order for a receiver, by way of equitable execution on his equity of redemption in the four houses.

The Plaintiffs did not register their order for a receiver under the *Land Charges Registration and Searches Act*, 1888, until the 17th of February, 1890, but they gave notice on the 20th of March, 1889, to the mortgagees and to the occupying tenants of the house. Shortly afterwards the mortgagees entered into possession of the premises by taking the rents and profits.

On the 21st of December, 1889, the mortgagees transferred their mortgages to *James Barnes*, the consideration in the case of each house being £1579 1*s.* 5*d.*, namely, £1500 for principal and £79 1*s.* 5*d.* for interest. On the 23rd of December, 1889, *Barnes* conveyed the houses to *Hannah Midgley* for the exact sum which he had himself paid to the mortgagees, viz. £1579 1*s.* 5*d.* for each house. *Barnes* purported to convey under the powers of sale contained in the original mortgages.

On the face of the documents there was nothing, except the fact that *Hannah Midgley* paid *Barnes* the same sum that he paid the mortgagees, to shew that anything was wrong or irregular in this transfer and sale, but *Barnes* was in fact a mere nominee of *Hannah Midgley*, and there was no real exercise of the power of sale.

On the 4th of March, 1890, *Hannah Midgley* mortgaged the houses for £6000, and the mortgagees had the legal estate conveyed to them in the usual way.

On the 6th of March, 1890, *Hannah Midgley* made a second mortgage to *Wigley* for £500.

*Hannah Midgley* died on the 13th of May, 1890, having by her will given all her real and personal estate to *Edwin Midgley*, whom she appointed her sole executor.

On the 29th of July, 1890, Mr. *A. P. Lilley* agreed to buy the property from *Edwin Midgley* for £2500, subject to the prior

mortgage for £6000. On the 13th of August a conveyance was executed by *E. Midgley* to *Lilley*, and he paid the £2500 purchase-money.

In July, 1890, *Lilley* had been shewn a valuation made by a firm of auctioneers in January, 1890, for the purposes of the mortgage by *Hannah Midgley*, and according to this valuation the value of the property was somewhat speculative, but was estimated at £8700. An abstract was delivered to *Lilley's* solicitors, Messrs. *Lee & Pemberton*, disclosing the deeds of the 12th of May, 1888, the 14th of May, 1888, the 14th of June, 1888, the 21st of December, 1889, the 23rd of December, 1889, and the 4th of March, 1890. The title was investigated by the solicitors on his behalf, and they made several requisitions, but none were made in respect of the transaction carried into effect by the deeds of December, 1889. They also made the usual searches in the Land Registry, but found nothing registered against *E. Midgley* from the time when he acquired the property.

As early as March, 1890, the Plaintiffs suspected that the sale to *Hannah Midgley* was not a *bonâ fide* sale. Her estate was being administered by the Court, and an order was obtained by the Plaintiffs on the 11th of August, 1890, for leave to take proceedings to impeach the sale. On the 15th of August, 1890, a writ was accordingly issued against *Barnes*, *Johnson*, and *E. Midgley* to set aside the sale by *Barnes* to *Hannah Midgley*, and to redeem the property on the footing that *E. Midgley* was only entitled to be treated as a mortgagee. *Lilley*, of whom the Plaintiffs knew nothing, was not a party to these proceedings. In June, 1891, however, *Lilley* heard that the sale by *Barnes* to *Midgley* was questioned. On the 17th of March, 1892, Mr. Justice *Stirling* declared that the sale was invalid, and the Plaintiffs were entitled to redeem the property, and on the 5th of November, 1892, the decision was affirmed on appeal.

On the 7th of February, 1893, a receiver of the four houses was appointed in the action. In March, 1893, *Lilley* moved to discharge this order; and before the motion was heard, in order to secure his title, he paid off the mortgage for £6000, and on the 11th of April, 1893, took a conveyance of the legal estate from the mortgagees.

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When the motion was brought on it was arranged that it should be treated as an application by *Lilley* to appear and be examined *pro interesse suo*, and it was subsequently agreed that the witnesses should be cross-examined before the Court, and that the learned judge should determine all questions as to the rights of *Lilley* and the Plaintiffs, in like manner as if an action had been brought for the purpose.

*Lilley* was accordingly examined and cross-examined. The result of the evidence was that he had no knowledge of any circumstances affecting *Hannah Midgley's* title beyond what appeared on the face of the deeds set out in the abstract, and the valuation of January, 1890.

The motion was heard before Mr. Justice *Stirling* on the 19th and 20th of April, 1893.

*Warrington*, for *Lilley*:—

Mr. *Lilley* is entitled to hold the property free from the Plaintiffs' equitable charge. He was a *bonâ fide* purchaser without any notice either actual or constructive of any defect in the title, or of any impropriety or irregularity in the exercise of the power of sale at the time when he made his purchase. He has acquired the legal estate from the mortgagees, and is entitled to rely on the protection afforded by sect. 21, sub-sect. 2 of the *Conveyancing Act*, 1881, and sect. 3, sub-sect. 1 of the *Conveyancing Act*, 1882: *Rice* v. *Rice* (1).

The knowledge that the sale was made at an undervalue (which is the utmost degree of knowledge that can be imputed to *Lilley*) is not enough to render it an improper exercise of the power of sale so as to give him constructive notice of the invalidity of the sale, although as between mortgagor and mortgagee, the mortgagor or second mortgagee might be entitled to relief.

*Fischer*, Q.C., and *Archibald Brown*, for the Plaintiffs:—

There was quite enough to affect *Lilley* with constructive notice of an improper or irregular exercise by *Barnes* of the power of sale, and the Plaintiffs are entitled to priority by virtue of their earlier equitable charge: *Phillips* v. *Phillips* (2); *Ind*,

(1) 2 Drew. 73.

(2) 4 D. F. & J. 208, 213.

*Coope & Co.* v. *Emmerson* (1); *Jackson* v. *Rowe* (2); *Farrar* v. *Farrars, Limited* (3); *Maxfield* v. *Burton* (4); *Parkinson* v. *Hanbury* (5); *Selwyn* v. *Garfit* (6). At all events, *Lilley* ought to have acquired notice of the *mala fides* of the sale. He was put upon inquiry, and his not having made inquiry was an act of culpable negligence. He only got in the legal estate quite recently—since the commencement of this action—and he is not entitled to the benefit of the provisions contained in the sections of the *Conveyancing Acts* of 1881 or 1882 which have been referred to: *Bellamy* v. *Sabine* (7); *Van Gelder* v. *Sowerby Bridge United District Flour Society* (8); *Campbell* v. *Holyland* (9); Rules of Supreme Court, 1883, Order XVI., rule 11.

*Midgley* was served with notice of motion, but did not appear.

*Warrington*, in reply:—

A legal estate acquired *pendente lite* is sufficient. The decision in *Robinson* v. *Davison* (10) shews, that if a third mortgagee buys in the first mortgage *pendente lite* the second mortgagee is excluded. That decision has never been dissented from, and it was cited with approbation in *In re Russell Road Purchase-Moneys* (11). Moreover, Order XXIV., rule 1, provides that any ground of defence arising after action brought may be raised in defence or in reply. If there was an improper or irregular exercise of the power of sale Mr. *Lilley's* title is not affected by it unless he had personal knowledge of it: *Selwyn* v. *Garfit*. It would be unreasonable to require every purchaser to inquire into the adequacy of the price paid for the property by the vendor. This was an embryo property of a speculative character, and the nominal rents had not been actually paid by the tenants. The purchaser was entitled to assume that the sale was made after due notice given to the mortgagor requiring payment of the mortgage money.

(1) 12 App. Cas. 300, 306.
(2) 2 S. & S. 472.
(3) 40 Ch. D. 395, 410.
(4) Law Rep. 17 Eq. 13.
(5) 1 Dr. & Sm. 143.
(6) 38 Ch. D. 273.
(7) 1 De G. & J. 566.
(8) 44 Ch. D. 374.
(9) 7 Ch. D. 166.
(10) 1 Bro. C. C. 65.
(11) Law Rep. 12 Eq. 78, 85.

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1893. May 16. STIRLING, J.:—

It has been agreed that I should determine all questions as to the rights of the Applicant and the Plaintiffs in like manner as if an action had been brought. The order now to be made will consequently contain a submission by both parties to be bound in like manner as if the order were made in an action brought by the Plaintiffs against the Applicant. The history of the action is shortly as follows [His Lordship then stated the facts of the case, and continued:—]

Mr. *Lilley* has quite recently, namely, on the 11th of April, 1893, taken steps for obtaining a transfer to himself of the mortgage of the 4th of March, 1890, and has got in the legal estate. Under these circumstances Mr. *Lilley* relies on the provisions of sect. 21, sub-sect. 2, of the *Conveyancing Act*, 1881, which are as follows: "Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power." I think that Mr. *Lilley* is entitled to the benefit of these provisions unless it can be made out that he had notice that the powers of sale contained in the mortgages of 1888, were improperly or irregularly exercised by *Barnes*. If he had such notice, then, in my opinion, the decisions on similar provisions actually introduced into mortgage deeds (as, for example, *Parkinson* v. *Hanbury* (1) and *Selwyn* v. *Garfit* (2)) ought to be applied. I think that to uphold the title of a purchaser who had notice of impropriety or irregularity in the exercise of the power of sale would be to convert the provisions of the statute into an instrument of fraud.

Now, Mr. *Lilley* had no actual knowledge of any impropriety or irregularity. Neither, in my opinion, did he wilfully shut his eyes and abstain from making inquiries which might have led to a knowledge of impropriety or irregularity. Sect. 3 of the

(1) 1 Dr. & Sm. 143. (2) 38 Ch. D. 273.

*Conveyancing Act* of 1882 provides as follows: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him"; and it is contended that he ought, having regard to the facts disclosed by the abstract, and to the valuation which was produced to him, to have made further inquiries.

I take it that to render the second branch of this section applicable, the circumstances must be such as to bring the case within what is laid down by Lord *Cranworth* in *Ware* v. *Lord Egmont* (1): "I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend this doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down."

The state of the title to which I have to apply the law is shortly this: Sale of the houses to *Johnson* in May, 1888, followed by mortgage of each house for £1500, the advance in one case being sanctioned by the Court, the inference being that the value must have been about £2200. In December,

(1) 4 D. M. & G. 460, 473.

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1889, there is a transfer of the mortgages followed immediately by a sale for the amount of the mortgage debt, namely, £6300, about, and the purchaser knew of a valuation, dated in January, 1890, shewing that the property was worth £8700.

It was quite possible that the transferee of the mortgage might have been in a position to exercise the power of sale at the time of the transfer. The events mentioned in sect. 20 of the *Conveyancing Act*, 1881, might have occurred prior to the transfer, and, but for the amount of the price, I cannot think that the sale could reasonably be supposed to be affected by any impropriety. As regards the price, a mortgagee "is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt": see *Farrar* v. *Farrars, Limited* (1).

The question, therefore, appears to me to reduce itself to this, whether the not obtaining further information as to the circumstances under which the sale took place amounted to culpable negligence; and, in my opinion, it did not. I think that Mr. *Lilley* or his advisers might reasonably have abstained from inquiring into that subject; and, therefore, that Mr. *Lilley* is entitled to rely on the apparent title created by the conveyances of the 23rd of December, 1889, and to hold the property to which he has now acquired a legal title, free from redemption by the Plaintiffs. There will be a declaration accordingly; but it is not a case for costs on either side.

W. W. K.

C. A.

From this decision the Plaintiffs appealed. The appeal came on to be heard on the 1st of August, 1893.

*Fischer*, Q.C., and *Archibald Brown*, for the Appellants:—

*Lilley* claims to be a purchaser for value without notice. Our reply is two-fold, first, that he bought nothing but an equity of redemption, and, therefore, notice or no notice, he took subject to all prior equities; secondly, he neither acquired the legal estate nor paid the £6000 until after he had notice of our charge. He could not better his position after he had given his notice of motion, and so the litigation with him had commenced.

(1) 40 Ch. D. 398.

[LINDLEY, L.J.:—Does the doctrine of *lis pendens* apply to a mere motion to discharge a receiver?]

The submissions in the order put the proceedings on the same footing as an action. The Court disregards what is done *pendente lite*: *Bellamy* v. *Sabine* (1),

[*Cozens-Hardy*, Q.C., referred to *Robinson* v. *Davison* (2).]

Every purchaser for value of an equitable interest, if he seeks protection by getting in the legal estate, must shew that he paid his money and took the legal estate without notice: *Peacock* v. *Burt* (3); *Pearson* v. *Benson* (4); *Toulmin* v. *Steere* (5).

[LINDLEY, L.J.:—We only wish to hear the counsel for the Respondents upon the question of notice.]

*Cozens-Hardy*, Q.C., and *Warrington*, for the Respondent *Lilley*:—

The contract was an ordinary contract, and the power of sale had arisen; there was no reason why the purchaser should look beyond this. The doctrine of constructive notice ought not to be carried too far. A purchaser is not bound to be suspicious, but only to take the ordinary precautions which men of business use: *Ware* v. *Lord Egmont* (6); *Montefiore* v. *Brown* (7). Under these circumstances we rely upon the *Conveyancing Act*, 1881, s. 21, sub-s. 2, and the *Conveyancing Act*, 1882, s. 3, sub-s. 1.

*Ashton Cross*, for the Defendant *Midgley*.

*Fischer*, in reply.

1893. Oct. 30. The judgment of the Court (*Lindley*, *Lopes*, and *A. L. Smith*, L.JJ.), was delivered by

LINDLEY, L.J. (after stating the facts as set forth above, proceeded as follows):—

The grounds of Mr. Justice *Stirling's* decision were (1.) that when *Lilley* agreed to buy the property in July, 1890, and when

(1) 1 De G. & J. 566.
(2) 1 Bro. C. C. 63.
(3) 4 L. J. (Ch.) (N.S.) 33.
(4) 28 Beav. 598.
(5) 3 Mer. 210.
(6) 4 D. M. & G. 460.
(7) 7 H. L. C. 241.

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he paid the £2500 to his vendor, he, *Lilley*, acted perfectly *bonâ fide* and without any actual notice of the invalidity of the sale by *Barnes* to *H. Midgley*; (2.) that *Lilley* had no constructive notice of such invalidity at those times; (3.) that although he had notice of such invalidity in June, 1891, he was entitled to protect himself by acquiring the legal estate, which he ultimately did; and (4.) that under these circumstances he was protected by sect. 21, sub-sect. 2, of the *Conveyancing Act*, 1881, and sect. 3 of the *Conveyancing Act*, 1882.

*Bona fides* on the part of Mr. *Lilley* and the absence of actual notice by him of anything wrong were found as facts by the learned Judge before whom Mr. *Lilley* was examined, and we accept his conclusions on these points.

The appeal then really turns on whether in July and August, 1890, Mr. *Lilley* is to be treated as having had notice of the invalidity of *Midgley's* title, and on the effect of acquiring the legal estate in April, 1893. This is one of those cases in which there is danger of referring knowledge of facts now known to a time anterior to their discovery—danger of falling into the error attributed to those who are wise after the event. The Plaintiffs' case against *Lilley* rests on the notice, if any, which he had in August, 1890, when he bought the property and paid the £2500. No doubt if he had been a suspicious or unwilling purchaser, he would very likely have made inquiries which would have induced him not to complete his purchase. But he was not suspicious in fact, and he did not make such inquiries as a suspicious man would perhaps have made. It would, however, be going too far to affect him with constructive notice of the invalidity of *Barnes'* sale. The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself. This will be seen both from well-known decisions and from the language of the *Conveyancing Act*, 1882, s. 3, which is now the authority to be regarded. In *Ware* v. *Lord Egmont* (1), Lord *Cranworth* stated the law on this subject

(1) 4 D. M. & G. 460.

in language which has always been accepted as correct. [His Lordship read the passage from p. 473 of the report, which was read by Mr. Justice *Stirling* in his judgment (1).]

"Gross or culpable negligence" in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of Vice-Chancellor *Wigram* in *Jones* v. *Smith* (2), the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong. The *Conveyancing Act*, 1882, really does no more than state the law as it was before, but its negative form shews that a restriction rather than an extension of the doctrine of notice was intended by the Legislature. The 3rd section runs thus (sub-sect. 1): "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." Can we say that Mr. *Lilley* or his solicitors "ought reasonably" to have made inquiries into the validity of the sale by *Barnes*? "Ought" here does not import a duty or obligation; for a purchaser need make no inquiry. The expression "ought reasonably" must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. Light is thrown on the meaning of "ought reasonably" by the *Conveyancing Act*, 1881, s. 21, sub-s. 2, which relieves purchasers from mortgagees purporting to sell under powers of sale from the necessity of inquiring into the propriety or irregularity of the exercise of the

(1) *Ante*, p. 31. (2) 1 Hare, 43.

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power. It is easy to see now that Mr. *Lilley's* solicitors might have been more suspicious and more cautious; but we are not prepared to say that they ought to have been so when he bought in August, 1890, and unless we can go that length we cannot hold that Mr. *Lilley* then had notice of anything wrong.

For these reasons we have come to the conclusion that, in August, 1890, when Mr. *Lilley* bought the property subject to the mortgage for £6000, he had no notice, actual or constructive, of any defect in his vendor's title.

The case, then, stands thus: The Plaintiffs had a judgment affecting *Johnson's* equity of redemption. *Lilley* had acquired by purchase for value an equitable interest in the same property from a person whose title apparently displaced *Johnson's*, and also, consequently, the Plaintiffs' judgment. *Lilley* had no notice of any defect in his own title, no notice that the Plaintiffs' judgment affected him. *Lilley* afterwards discovers that the Plaintiffs' judgment is not displaced, and in order to protect himself he pays off the £6000 mortgage and gets in the legal estate. The question is whether he can now hold the property free from the Plaintiffs' judgment.

We are of opinion that he can. The maxim *Qui prior est tempore potior est jure* is in the Plaintiffs' favour, and it seems strange that they should, without any default of their own, lose a security which they once possessed. But the above maxim is, in our law, subject to an important qualification, that, where equities are equal, the legal title prevails. Equality, here, does not mean or refer to priority in point of time, as is shewn by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. The reasoning is technical and not satisfactory; but, as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament: see *Brace* v. *Duchess of Marlborough* (1).

(1) 2 P. Wms. 491.

It was contended that this doctrine was confined to tacking mortgages. But this is not so. The doctrine applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them: see *Saunders* v. *Dehew* (1), and *Pilcher* v. *Rawlins* (2). It is true that the doctrine does not apply to an equitable owner or incumbrancer who gets in the legal estate from a trustee who commits a breach of trust in conveying it to him—at all events, if such breach of trust is known to the person who gets in the estate, and, perhaps, even if he does not know of it: see *Carter* v. *Carter* (3); *Mumford* v. *Stohwasser* (4). But the present case does not fall within this exception to or qualification of the general principle; for *Lilley* obtained the legal estate from a mortgagee whom he paid off, and who committed no breach of trust in conveying the legal estate to him.

The fact that the estate was got in *pendente lite* is immaterial: see *Robinson* v. *Davison* (5), and *Bates* v. *Johnson* (6).

The appeal must be dismissed with costs.

Solicitors: *Jackson, Smart, Geake, & Woodd; Lee & Pembertons; Chappell, Griffith, & Brookbridge; G. Chalcraft.*

(1) 2 Vern. 271.
(2) Law Rep. 7 Ch. 259.
(3) 3 K. & J. 617.
(4) Law Rep. 18 Eq. 556.
(5) 1 Bro. C. C. 63.
(6) Joh. 304.

M. W.

CHITTY, J.
1893
Nov. 10

# ROSS *v.* WOODFORD.

[1892 R. 1473.]

*Practice—Evidence abroad—Examination of Parties to the Suit—Application by Defendant—Discretion—Rules of Supreme Court,* 1883, *Order* XXXVII., *r.* 5.

In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the Court will not regard the case of a Defendant with the same strictness as the case of a Plaintiff who has chosen his own forum.

## MOTION.

This was an application on behalf of the Defendants, a husband and wife, now resident in the *Transvaal*, that their evidence, and that of any of their witnesses resident in *South Africa*, might be taken in that country, by Commission or Special Examiner.

The object of the action was, to enforce the Plaintiff's alleged legal title to eighty £100 shares in the capital of the "*S*" *Syndicate* of *Pretoria*, a joint stock company established in the South African Republic of the *Transvaal*. By his statement of claim the Plaintiff alleged, that there was an agreement, of November, 1890, signed by one of the Defendants, the wife, binding her to assign these shares to the Plaintiff, as his absolute property.

The Defendants by their statement of defence alleged, that these shares were agreed to be transferred to the Plaintiff by way of security only, for money advanced to them by him, and that the wife did not understand the effect and nature of the agreement when she signed it.

At the time of the alleged agreement, the Defendants were temporarily resident in *England*; they were also in *England* in August, 1892, when this action was commenced, and had been served in *England* with the writ, and had entered an appearance in due course.

Since the commencement of the action, both the Defendants had returned to the *Transvaal* with their children, and were now

resident there, the husband being employed as an engineer, at *Johannesburg*. It was stated that the husband was an American citizen, and that his permanent home was *Johannesburg*.

The statement of claim was delivered on the 31st of December, 1892. The statement of defence was delivered on the 21st of March, 1893; and on the 4th of May, 1893, notice of trial was given; the action had been set down as a witness action, and was likely to come into the list for trial very shortly.

Since the action had been set down for trial, the Plaintiff had delivered an amended statement of claim, alleging fraud and misrepresentation, and on the 28th of October, 1893, an amended defence was put in.

The only evidence in support of the application was an affidavit by the Defendants' solicitor, which stated, that neither of the Defendants had any property within the jurisdiction of the Court; that at the commencement of the action they were only temporarily resident in *England*, their permanent home being *Johannesburg*; that all the evidence which was material to the Defendants' case could be given only by persons resident in *South Africa*, whose attendance in this country at the trial the Defendants could not procure; that the Defendants were in poor circumstances, and it was impossible for them to come to *England* to give evidence at the trial, as they could not afford to pay the expenses of the journey.

After the motion had been opened, the Plaintiff, by his counsel, offered to advance a sum of £200, to pay the return fares of the Defendants to *England*, leaving it to the Court at the trial to decide whether the Plaintiff or Defendants should ultimately bear this expense; this offer was, however, declined on behalf of the Defendants as insufficient.

*Byrne*, Q.C., and *E. A. Geare*, for the motion:—

The matter is entirely a question of discretion, and the particular circumstances of this case afford a reasonable ground for granting this application. The Defendants are out of the jurisdiction, their examination on commission, or before a Special Examiner abroad, will be much less expensive than bringing

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them over to the trial in *England*, and there is nothing to shew that their presence in Court is essential: *Coch* v. *Allcock* (1).

As a matter of fact, it is impossible for the Defendants to come over here for the trial, partly on the ground of expense, partly on the ground of the Defendants' engagements. An application by a defendant should not be criticised with the same strictness as an application by a plaintiff who chooses his own forum. It would be oppressive and unfair to refuse this application. The application is made *bonâ fide*, and not for purposes of delay. [*In re Boyse* (2) was referred to.]

The Defendants are permanently resident in the *Transvaal*, and the Plaintiff has no right to insist upon bringing them over here. The offer to provide £200 is wholly insufficient.

*Farwell*, Q.C., and *J. E. C. Munro*, for the Plaintiff:—

This is eminently not a case for taking the Defendants' evidence abroad. The only issue in this action is, which side is telling the truth, and the result must depend on the way the evidence is given at the trial in the witness-box, so that it is of the utmost importance that the Judge who tries the action should see the demeanour of the witnesses in Court. The Plaintiff is in *England* and will be examined and cross-examined, but if the Defendants' evidence is to be taken abroad, as proposed, the Plaintiff will be at a great disadvantage.

It seems to be the settled practice now, that in cases where the plaintiff is abroad, and the circumstances are such that he ought to be cross-examined in open Court, a commission will not be allowed to issue if the defendant opposes it, and in this case the Defendants are practically plaintiffs, inasmuch as they ask that these eighty shares be held as security only for the amount of the Plaintiff's advances. [*Nadin* v. *Bassett* (3), *Armour* v. *Walker* (4), and *Berdan* v. *Greenwood* (5) were referred to.]

It is absolutely necessary for the purposes of justice that the Defendants should attend at the trial, and it has not been

(1) 21 Q. B. D. 178.
(2) 20 Ch. D. 760.
(3) 25 Ch. D. 21.
(4) Ibid. 673.
(5) 20 Ch. D. 764, n.

shewn that it is impossible for them to attend; in fact, the motion is not supported by any direct evidence. The application is not made *bonâ fide*; it is made too late, and at the last moment, simply to delay the trial. The Plaintiff's offer to provide £200 for the return fares is an evidence of his *bona fides*, and is sufficient to meet the allegation as to the Defendants' want of means.

*Byrne*, in reply.

Chitty, J.:—

This is a motion on behalf of Defendants asking that their evidence may be taken abroad, which is strenuously opposed by the Plaintiff, who is resident in *England*.

The Court, before allowing evidence to be taken abroad, requires to be satisfied that the application is made in good faith, and not for the purposes of delay and embarrassment.

First of all, I must consider whether this application is an honest one; as to the law of these cases, it is now settled that it is entirely a question for the discretion of the Court to grant or withhold what is asked for.

[His Lordship then stated shortly the object of the action and the defence, and continued:—]

When the writ in this action was issued, the Defendants happened to be temporarily resident in this country; but it is a material fact in this case that the husband is an American citizen, who has never been domiciled in this country, and whose true home appears to be in the *Transvaal*, and I am satisfied on the evidence that the Defendants did not leave this country for *South Africa* with a view to escape being examined, or to avoid or delay the trial; and I also come to the conclusion that this application is made in good faith. With reference also to the charge that this application is made too late, and at the last moment for purposes of delay, I do not think that it is made out, because one has only to look at the dates, when the pleadings were delivered, to see that the Defendants were not in a position to come much earlier, because the Plaintiff amended his statement of claim on the 30th of August, and the Defen-

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dants' amended defence was not delivered till the 28th of October last.

No doubt it is a matter of great importance to see the demeanour of the witnesses in open Court, where there is likely to be, as in this case, a considerable conflict of testimony; but that is not the point I have to decide in this case: the point is, whether by refusing the Defendants' application I am to compel them either to give up their case, or come over here at great expense and inconvenience to attend the trial.

There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself: so too with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out; but the case is entirely different when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business: and to compel these Defendants to come over here, at great expense to attend the trial, or give up their case, would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself.

It was said by Mr. *Farwell* that the Defendants in this case were practically in the position of plaintiffs, and that as their application was opposed, no commission, according to the cases, ought to be allowed to issue; but I do not think he has made good that proposition. Fully alive as I am to the advantage of seeing the witnesses in open Court, the circumstances of the present case are not such as to justify me in refusing the Defendants' application.

[His Lordship, having referred to the Plaintiff's offer to provide £200 for the return fares to *England* as being quite inadequate, continued:—]

The result, therefore, is that, on the balance of convenience and inconvenience, and in the exercise of my judicial discretion,

I think it right to allow the Defendants' application, but I must have an undertaking on their behalf to proceed with due diligence. It seems to me if this point is attended to, the course proposed by the Defendants will rather expedite than delay the trial.

Solicitors: *Day, Russell & Co.; Burn & Berridge.*

W. C. D.

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## *In re* BROOKE.
## BROOKE *v.* BROOKE.

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*Nov.* 7, 8, 14.

[1893 B. 1052.]

*Will—Construction—Devise to Trustees—Extent of Estate—Direction to pay Debts—Contingent Remainder—Failure of particular Estate.*

A testatrix, who died in 1875, after directing her debts to be paid by her executors thereinafter named, specially devised a freehold messuage to her sons *H.* and *W.* and their heirs, upon trust to allow the said *H.* to use and enjoy the same for his life, and after his decease upon trust for all and every one or more of the children of the said *H.* as he should by deed or will appoint, and in default of appointment in trust for all and every one or more of the children of the said *H.* who being sons should attain twenty-one, or being daughters should attain that age or marry, and appointed her said sons *H.* and *W.* her executors.

*H.* having died in 1892, without having exercised the power of appointment, leaving two children, infants and unmarried, the question arose whether the remainder to the children was a legal contingent remainder which had failed for want of a freehold to support it, or whether the legal estate in fee was vested in the devisees and executors:—

*Held*, that the direction to pay debts was sufficient to shew that the testatrix did not mean to avail herself of the machinery of the *Statute of Uses* in the specific devise to her sons and their heirs, or to make them mere conduit pipes of the legal estate, but that she intended that the legal estate should pass to, and not through, them "in trust" according to the modern signification of the term, and consequently that the estates given to the infants were equitable and did not fail.

*Creaton* v. *Creaton* (1), *Spence* v. *Spence* (2), and *Marshall* v. *Gingell* (3) considered and applied.

## ADJOURNED SUMMONS.

*Elizabeth Brooke*, by her will dated the 21st of April, 1875,

(1) 3 Sm. & Giff. 386. (2) 12 C. B. (N.S.) 199.
(3) 21 Ch. D. 790.

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after directing her just debts and funeral and testamentary expenses, and the legacies bequeathed by her will, to be paid by her executors thereinafter named, as soon as conveniently might be after her decease; and, after giving certain legacies, devised and bequeathed a freehold messuage, No. 4, *Royal Crescent, Bath,* together with the furniture, plate, plated articles, linen, china, glass, books, pictures, prints, and other household effects therein at the time of her decease, unto "my sons, *Henry Brooke* and *William John Brooke,* their heirs, executors, and administrators respectively, upon trust that they and the survivors and survivor of them shall permit the said *Henry Brooke* and his assigns to use, occupy, and enjoy the same during the term of his natural life, he keeping the same in tenantable repair, and insured against fire, and from and after his decease shall stand possessed thereof, upon trust for all and every one or more of the child or children of the said *Henry Brooke,* as he shall by deed or will appoint, and in default of such appointment, then in trust for all and every his children and child, who being sons or a son shall live to attain the age of twenty-one years, or being daughters or a daughter shall attain that age or previously marry, in equal shares and proportions as tenants in common, and if there shall be only one such child, then in trust for such child." And if there should be no such child, then upon precisely similar trusts for the said *William John Brooke* during his life, and after his death for his children, with remainders over. The testatrix declared that it should be lawful for the person for the time being entitled under the trusts of that her will to the use, occupation, and enjoyment of the said messuage with the appurtenances, to lease the same for any term not exceeding seven years; and after giving some further legacies and annuities, the testatrix devised and bequeathed her residuary real and personal estate "unto and to the use of her said son *Henry Brooke* and to *Ernest Wallace Rooke* (hereinafter called my said trustees), their heirs, executors, administrators, and assigns respectively, upon trust" for sale and conversion as therein mentioned; and she appointed her said son *Henry Brooke* and the said *Ernest Wallace Rooke* trustees of that her will, and her said sons *Henry Brooke* and *William John Brooke* executors.

The testatrix died on the 28th of April, 1875, and her will was proved by both the executors. The son, *Henry Brooke*, died on the 11th of November, 1892, without having exercised the power of appointment, leaving two children, both infants and unmarried.

The infants, by their next friend, now applied by originating summons, for the determination of the question whether the remainder to them, after the death of *H. Brooke*, was a legal contingent remainder which had failed for want of a freehold to support it, or whether the legal estate in fee was vested in the executors as trustees.

The summons was adjourned into Court, and now came on for argument.

*C. E. E. Jenkins*, for the infants:—

The direction to the executors to pay debts, is sufficient to charge the specifically devised realty, and is also sufficient to shew that the testatrix intended the legal estate in the messuage to remain with the executors, who are also the devisees, for the performance of the duty imposed on them. *Spence* v. *Spence* (1); *Creaton* v. *Creaton* (2); *Marshall* v. *Gingell* (3); true, in these cases there was, in the first instance, an obviously equitable life interest, so that the trustees took the legal estate at all events for the life of the first tenant for life, and the Court only had to enlarge this legal life estate into a fee simple; but if the whole legal fee was taken, as was there held, in order to provide for the payment of debts, it does not, in principle, matter whether the first life estate is manifestly equitable or not. Undoubtedly here there is a charge of debts, and that is sufficient, on the authorities, to give these executors the legal fee. This will has already been before the Court on the question whether the legacies were charged on the residuary real estate: *In re Brooke* (4), where it was held they were so charged.

Another point in favour of the contention that *Henry Brooke* and his children take merely equitable interests, is to be found

(1) 12 C. B. (N.S.) 199.
(2) 3 Sm. & Giff. 386.
(3) 21 Ch. D. 790.
(4) 3 Ch. D. 630.

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in the fact that the gift of the chattels in the messuage is combined with the gift of the messuage itself; the power of leasing too is extended to the chattels, by the word "appurtenances."

On the whole will the true construction, therefore, is that the estate in remainder to the children is equitable, and has not failed.

*B. B. Rogers*, for the trustees:—

The fact that several kinds of property are blended in one gift, does not prevent the law applicable to each kind of property from applying: *Forth* v. *Chapman* (1); *Baker* v. *White* (2); and the law applicable to this devise, if it is a legal remainder, is quite clear: *Rhodes* v. *Whitehead* (3). As to the charge of debts giving the devisees a legal fee, in all the cases relied on for the infants, the devisees took some legal estate in the realty devised, and the effect of those authorities is limited by that circumstance. This artificial rule should not be extended to a case like the present, where but for the charge of debts there could be no legal estate in the executors and devisees. There is a great difference between enlarging a legal estate that is already vested in trustees, and giving them a legal fee simple where they take nothing under the devise. No case has been cited in which devisees, taking no estate whatever, apart from the direction to pay debts, have been held to take the fee, on account of that direction. [He referred to *In re Tanqueray-Willaume & Landau* (4).]

The will must be construed strictly without regard to the consequences: *Cunliffe* v. *Brancker* (5), and if this is done the limitation being legal the remainder to the children fails for want of an estate of freehold to support it.

*Jenkins*, in reply.

1893. Nov. 14. CHITTY, J.:—

The question is whether, on the true construction of the will, *Henry Brooke* and *William John Brooke* took the legal estate in

(1) 1 P. Wms. 663.
(2) Law Rep. 20 Eq. 166.
(3) 2 Dr. & Sm. 532.
(4) 20 Ch. D. 465, 476.
(5) 3 Ch. D. 393.

fee simple in the messuage, No. 4, *Royal Crescent*, specifically devised. If they did, the contingent remainders to the children of *Henry Brooke* are valid: if they did not, the estates of the children being limited by way of legal contingent remainders have failed to take effect, on the rule established by *Festing* v. *Allen* (1). In determining the question I am bound, according to the judgment of *James*, L.J., in *Cunliffe* v. *Brancker* (2), to construe the will as it stands, without regard to this feudal rule, notwithstanding that it is not adopted in equity when the legal fee is vested in trustees, notwithstanding that it defeats the testator's intentions, and ought, in the opinion of eminent judges, to have been abolished long ago (see the judgment of Sir *George Jessel* in the same case (3)), and has been at last abolished by statute, which, however, does not reach back to the will of this testatrix (see the statute 40 & 41 Vict. c. 33).

On this will one point is quite clear; the devisees, *Henry Brooke* and *William John Brooke*, take in the specifically devised messuage, either the entire legal estate in fee simple as joint tenants, or they take nothing at all, being merely conduit pipes to carry the legal estate to *Henry Brooke* and his children; there is no intermediate position admissible; they do not take a partial interest in the legal fee. For the sake of clearness I may treat the will as consisting of three parts; first, the direction to the executors at the beginning of the will; secondly, the specific devise and the bequest of furniture and chattels; and thirdly, the residuary devise and bequest. The residuary devise and bequest is made "unto and to the use of my said son *Henry Brooke*, and to *Ernest Wallace Brooke*, hereinafter called my said trustees their heirs, executors, administrators and assigns, respectively upon trust" for sale and conversion After declaring the beneficial trusts of the proceeds of sale and conversion, the testatrix expressly appoints these two persons trustees of her will, and appoints her sons *Henry Brooke* and *William John Brooke*, her executors. On this third part of the will it is unquestionable that the legal estate in fee was devised to the trustees named, upon duly constituted "trusts" in the

(1) 12 M. & W. 279. (2) 3 Ch. D. 407.
(3) 3 Ch. D. 369.

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modern sense of the term. There was however a question, whether the legacies previously given by the will were charged on the residuary realty; the question was decided in the affirmative in *In re Brooke* (1). The decision turned on the rule established by *Greville* v. *Browne* (2), which was held to apply, notwithstanding the direction to the executors at the beginning of the will.

I turn now to the specific devise, dealing with it, for the moment, without reference to the direction to the executors. The testatrix thereby devised and bequeathed the messuage and the appurtenances with the furniture and other specified chattels unto her sons *Henry Brooke* and *William John Brooke* their heirs executors and administrators respectively, upon trust (in effect) to permit *Henry Brooke* to occupy and use the same during his life, and from and after his decease to stand possessed thereof for his children as he should appoint (he made no appointment), and in default, in trust for his children, who being sons should attain twenty-one, or being daughters, should attain that age or previously marry, with limitations over, all of which are expressed in the same form, viz.: "upon trust" or "in trust." No active duties in regard to the messuage are, in express terms, imposed upon the devisees, the two sons. It is clear that to this specific devise, still treated as standing alone, the rule laid down in *Doe* v. *Biggs* (3) and established by subsequent authorities would apply; and that notwithstanding the employment of the term "trust," the devisees, the sons, would be mere conduit pipes, and the legal estate would pass to *Henry Brooke* for life, with a contingent remainder to his children. The term "trust" would be read not in its modern sense, but in the old sense in which it was understood before and in the *Statute of Uses*, 27 Hen. 8, c. 10, which admitted of no difference between "uses" and "trusts." The statute itself, as has often been observed, does not of its own force apply to wills, the *Statute of Wills* having been subsequently passed (see, for instance, *In re Tanqueray-Willaume & Landau* (4)), but testators are at liberty to employ the machinery of the statute for the purpose of mani-

(1) 3 Ch. D. 630.
(2) 7 H. L. C. 689.
(3) 2 Taunt. 109.
(4) 20 Ch. D. 478.

festing their intention. To take familiar illustrations, a devise to the use of *A.* and his heirs, in trust for *B.* and his heirs, passes the legal estate to *A.* in fee; a devise to *A.* and his heirs, to the use of *B.* and his heirs, or in trust for *B.* and his heirs, passes the legal estate in fee to *B.*, there being no duties to be performed by *A.*, requiring that the legal fee should remain in him, but when there are such duties, as where the devise is to *A.* and his heirs, in trust for a married woman and her heirs for her separate use, the legal estate remains vested in *A.* for the protection of the married woman. The will before me affords a further illustration; the devise of the residuary real estate is to the "use" of the persons named and their heirs, upon trust to sell. This clearly shews that the legal estate was intended to be taken by them, and for two reasons; first the employment of the word "use," and secondly the execution of the duties imposed; either of the reasons is sufficient. On the other hand, the specific devise, taken apart from the rest of the will, carries the legal estate to the apparent *cestuis que trust.* At the end of the specific devise, the testatrix confers a power to lease the messuage with the appurtenances, which, however, is not given to the two sons, but to the persons for the time being entitled "under the trusts of this my will" to the use and enjoyment of the messuage. This power does not throw much light, one way or the other, on the testatrix's intention. I have seen, in regularly drawn wills, where it was clear that the legal estate passed to the trustees, a similar power conferred upon the equitable tenants for life. The term "trusts" in the clause is capable of being taken in either of the senses above indicated. It is, however, not inconsistent with the view that the tenants for life are intended to take merely equitable interests.

An argument, in support of the contention that the son *Henry* and his children take merely equitable interests, was founded upon the bequest of the chattels in the house being combined with the gift of the house itself. But this argument is disposed of by *Baker* v. *White* (1) and *Forth* v. *Chapman* (2). It was part of the same argument that the leasing power extended to the chattels by reason of the word "appurtenances"; but the same

(1) Law Rep. 20 Eq. 166. (2) 1 P. Wms. 663.

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word occurs in the devise itself in reference to the messuage; and if it be necessary to express an opinion on the point, my opinion is that the chattels are not included in the power.

I am now brought to consider the effect of the direction at the beginning of the will. It is a direction that the testatrix's debts and funeral and testamentary expenses and the legacies bequeathed by the will shall be paid "by my executors hereinafter named." And the critical question is, what effect this direction has upon the specific devise made to the persons afterwards appointed executors? It is admitted that this direction is sufficient to charge the specifically devised realty with the debts, expenses, and legacies directed to be paid; for the trustees of the residuary estate, who claim that the specifically devised messuage has fallen into the residue, it is contended that the direction has no further operation; for the children, it is contended that the direction is sufficient to shew that the testatrix intended the legal estate in the messuage should remain with the devisees, the executors, for the performance of the duty imposed on them of making the payments. For the children, three authorities were principally relied on: *Creaton* v. *Creaton* (1), *Spence* v. *Spence* (2), and *Marshall* v. *Gingell* (3). For the trustees of the residue, it was pointed out that in all these cases there was no question that the devisees took at least some legal estate in the realty devised; and it was contended that the effect of the authorities was limited by that circumstance.

It is necessary, then, to consider these authorities shortly, with a view to extract from them the principles on which they are founded. In *Creaton* v. *Creaton* the subject of the devise was copyhold, to which, of course, the machinery of the *Statute of Uses* could not possibly be applied. (See *Baker* v. *White* (4).) The will, made in 1818, contained a direction that the testator's debts and funeral and testamentary expenses should be paid, but without stating in terms by whom the payments were to be made. The will then proceeded to devise the copyholds to three persons named (also his executors) and the survivors and survivor of them and the heirs

(1) 3 Sm. & Giff. 386.
(2) 12 C. B. (N.S.) 199.
(3) 21 Ch. D. 790.
(4) Law Rep. 20 Eq. 166.

of the survivor upon trusts (in effect) for the heirs of certain beneficiaries and the survivor, and from and after the decease of such survivor, the will contained direct devises over; the form employed being "I give and devise." The real difficulties in the case arose from this partial declaration of trust, which did not exhaust the customary estate of inheritance in the copyholds, and from the form of the gift over; but the Vice-Chancellor found in the direction for payment of the debts sufficient ground for surmounting these difficulties, and held that the three executors and devisees took the legal estate in the whole of the customary estate of inheritance. His decision was followed by the Court of Common Pleas in *Spence* v. *Spence* (1). In that case the testator by his will, made after January, 1838, directed payment of his debts and funeral and testamentary expenses by his executors, and devised to the persons afterwards appointed his executors, all his real estate, in trust to pay the rents to his son *Jonathan* for life, and "from and immediately after" his death, "in trust for the right heirs" of his said son. It was held that, by reason of the direction to pay debts, the executors and devisees took the legal estate in fee, and that the son took merely an equitable estate in fee. In his judgment Mr. Justice *Willes* states (2), that he was far from saying that the words "in trust" would alone have the effect of giving the legal estate to the trustees (meaning the devisees also executors); but he went on to say that those words were at all events consistent with the legal estate being entirely vested in them. He then observed that there certainly was nothing by implication shewing that they were to take any less estate; and that the direction to pay the debts by implication shewed the contrary. The consequence was, as he said, that they took power over all the property, for the purpose of enabling them to pay the debts, and they could only have that power by allowing them to take the legal fee. These observations are very pertinent to the will before me. In *Marshall* v. *Gingell* (3), the testator by his will, made in 1838, after directing his debts to be paid, without saying by whom, devised a freehold farm to four persons, afterwards appointed

(1) 12 C. B. (N.S.) 199. (2) 12 C. B. (N.S.) 211, 212.
(3) 21 Ch. D. 790.

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executors, their heirs and assigns upon trust (in effect) for his daughter, during her life for her separate use, and from and after her decease, upon trust for, and he gave and devised the farm to, her children. Mr. Justice *Kay* followed *Creaton* v. *Creaton* (1) and *Spence* v. *Spence* (2), although he observed that the latter was the strongest case on the subject.

Although, then, in these three cases, the devisees clearly took the legal estate for the purposes of the partial express trusts, which were not commensurate with the fee or customary estate of inheritance, I think that this circumstance did not form the ground of the decisions; and that the principle to be extracted from them is to be found in the direction to pay debts.

Applying, then, these authorities to the will before me, I hold that the direction to pay debts is sufficient to shew that in the specific devise to her two sons and their heirs, in trust for her son *Henry* and his children, the testatrix did not mean to avail herself of the machinery of the *Statute of Uses*, or to make them mere conduit pipes of the legal estate; but that, on the contrary, she intended that the legal estate should pass to, and not through, them in trust, according to the modern signification of the term "trust."

The result then is, that the estates of the children are equitable, and have not failed.

Solicitors: *Robinson, Preston, & Stow*, agents for *Rooke & Coker, Bath.*

(1) 3 Sm. & Giff. 386. (2) 12 C. B. (N.S.) 199.

W. C. D.

## *In re* FISHER.

CHITTY, J.

1893
Nov. 18.

*Compulsory Purchase under Special Act—No Provision in Act as to Payment out of Money paid in under the Act—Petition for Payment out—Costs—Jurisdiction—Rules of Supreme Court,* 1883, *Order* LXV., *r.* 1—*Supreme Court of Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Where an Act enabling a public body to take land compulsorily contains no provision as to payment out of Court of moneys paid in under the Act, the Court has under sect. 5 of the *Supreme Court of Judicature Act,* 1890, jurisdiction to order the public body to pay the costs of and incidental to a petition for payment out.

PETITION.

The Commissioners of Sewers, acting under the powers conferred on them by an Act of Parliament (57 Geo. 3, c. xxix.), purchased certain leasehold hereditaments which were vested in the trustees of the will of *R. Fisher* upon trust for accumulation during the life of *F. Fisher,* and at his death upon trust for sale and distribution.

The purchase-money was agreed at £1475, and was paid into Court and invested in Consols.

*F. Fisher* having died in 1892, the trustees of the will now applied for payment out to them of the sum of Consols, and for an order that the Commissioners should pay the costs of the petition.

It appeared that the Act 57 Geo. 3, c. xxix., contained no provision relating to the payment out of Court of money paid in under the Act, but only for its reinvestment in land, the costs of which, as also of interim investments were made payable by the Commissioners.

*Turnour Murray,* for the Petitioners:—

Prior to the passing of the *Judicature Act,* 1890, the Court had no jurisdiction under the *Judicature Acts* and the rules to order costs to be paid by persons who before those Acts came into operation could not have been ordered to pay them: *In re Mills' Estate* (1); but I submit that the effect of sect. 5 of the Act of

(1) 34 Ch. D. 24.

CHITTY, J. 1893 *In re* FISHER.

1890, which enacts that, "subject to the *Supreme Court of Judicature Acts*, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid," is to give the Court jurisdiction over the costs in a case like this.

*John Henderson*, for the Commissioners:—

The Court has no jurisdiction to order these costs to be paid by the Commissioners. The *Judicature Act*, 1890, has left the matter as it stood after *In re Mills' Estate* (1) was decided, only expressing in an Act the effect of Order LXV., rule 1. There were doubts about that rule, and the Legislature put the matter beyond doubt by an enactment which gives a statutable rule to the same effect as that order: *London County Council* v. *Churchwardens and Overseers of West Ham* (2).

CHITTY, J.:—

Before the passing of the *Judicature Act*, 1890, it was decided by the Court of Appeal in *In re Mills' Estate* that the Court had no jurisdiction in a case such as this is to give the Petitioners costs against the Commissioners. In *Ex parte Mercers' Company* (3) the Master of the Rolls (Sir *G. Jessel*) had decided the contrary; but the Court of Appeal declined to follow his decision, and came to the conclusion that Order LXV., rule 1, did not confer any jurisdiction as to costs in cases where none existed, but only regulated the existing jurisdiction.

Then the *Judicature Act*, 1890, was passed, and it is contended on behalf of the Commissioners that sect. 5 of that Act has not the effect of conferring any jurisdiction as to costs. But, in my opinion, it has conferred such jurisdiction, and that in cases where jurisdiction did not previously exist.

It is argued that the limitation of jurisdiction, if any there be,

(1) 34 Ch. D. 24. (2) [1892] 2 Q. B. 173.
(3) 10 Ch. D. 481.

is to be found both in the express words of the section, and by holding it to apply only to cases where, before the Act, the Court had jurisdiction to award costs to or against either party. The latter view is not, I think, maintainable, for the enactment would then come to this: that where before the Act a discretion existed as to costs, it was still to exist. Nor can I follow the contention that on the true construction of sect. 5 the jurisdiction is limited to cases coming within Order LXV., rule 1. It is plain that the Legislature was not simply re-enacting that rule, for it adds the proviso as to "the express provisions of any statute" which was not to be found in the rule, and if the intention was merely to give jurisdiction where it already existed, there was no reason for adding the concluding words of the section, "and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

Here is a clear conferring of jurisdiction. It is said that "such costs" means not costs "of and incidental to all proceedings," but costs which are in the discretion of the Court under Order LXV., rule 1. But I cannot get this meaning out of the words used, and, taking the proviso "subject to the express provisions of any statute," I find that the Act under which this land was compulsorily taken contains no express provision, and, "express" only being mentioned, none is to be implied.

The result is that I hold the Court has jurisdiction to exercise its discretion with regard to these costs.

Reference has been made to observations in the judgments in the *London County Council* v. *Churchwardens and Overseers of West Ham* (1); but they do not touch the point, unless it be the suggestion thrown out by Lord Justice *Fry*. I conceive myself, therefore, to be at liberty to decide this question on what I hold to be the true meaning of sect. 5. I therefore give the Petitioners their costs of and incidental to this application, to be paid by the Commissioners.

Solicitors: *Paddison, Fullilove, Cummins, & De la Chapelle; E. A. Baylis.*

(1) [1892] 2 Q. B. 173.

G. M.

NORTH, J.
1893
Nov. 2, 10.

# *In re* TYSSEN.
# KNIGHT-BRUCE *v.* BUTTERWORTH.

[1893 T. 357.]

*Power of Appointment—Appointment to Trustee for object of Power—Transfer of Fund to Trustee nominated by Donee of Power.*

By a marriage settlement a fund was vested in trustees, upon trust, after the death of the survivor of the husband and wife, for the children of the marriage at twenty-one or marriage, in such shares and in such manner as the husband and wife should by deed jointly appoint, with remainders over. There were six children of the marriage, all of whom attained twenty-one. The husband and wife executed a deed, by which they appointed that the trustees should, after the death of the survivor of the husband and wife, stand possessed of one-sixth part of the trust fund in trust for *R.* (one of the daughters), her executors and administrators, for her separate use. And it was declared that the appointment was made to her upon certain trusts for the benefit of *E.*, another of the daughters:—

*Held*, that the one-sixth part thus appointed ought not to be transferred to *R.*, as trustee under the appointment, but ought to be retained by the trustees of the settlement.

*Busk* v. *Aldam* (1) followed.

SUMMONS by the trustees of a settlement, dated the 28th of April, 1843, made on the marriage of *Francis Samuel Daniel Tyssen* with *Eliza Julia Knight-Bruce*, asking for the determination by the Court, under the Rules of the Supreme Court, Order LV., rule 3, of (*inter alia*) the question, whether, in the events which had happened, one-sixth part of the trust funds, minus £383, which, by a deed poll, dated the 20th of May, 1875, and executed by the husband and wife, was appointed in trust for *Rosalind Harriet Butterworth*, a child of the marriage, upon trust as therein mentioned, ought to be paid or transferred by the Plaintiffs to *Rosalind Harriet Butterworth* as trustee thereof, or whether the same ought to be retained by the Plaintiffs as trustees of the settlement.

By the settlement of the 28th of April, 1843, the property therein comprised was vested in the trustees thereof, upon trust to pay the income thereof to the husband for his life, and

(1) Law Rep. 19 Eq. 16.

after his death to the wife for her life, and after the death of the survivor in trust for all and every, or such one or more exclusively of the other or others, of the children of the marriage, who, being a son or sons, should attain the age of twenty-one, or, being a daughter or daughters, should attain that age or be married, with such provisions for their respective maintenance and education or advancement, and in such parts, shares, and proportions, and with such annual sums of money, and future or executory or other trusts, being for the benefit of the said children or some or one of them, and upon such conditions, with such restrictions, and in such manner as the husband and wife should by deed jointly appoint, with remainders over.

There were six children of the marriage, five daughters and one son, all of whom attained twenty-one. The husband died on the 3rd of September, 1875; the wife died on the 24th of July, 1892. *Rosalind Harriet*, one of the daughters, in 1877, married *R. W. Butterworth*, and *Ellen Blanche*, another of the daughters, in 1881, married *William Fletcher*.

By the deed poll of the 20th of May, 1875, the husband and wife appointed that the trustees of the settlement should stand possessed of five-sixth parts of the trust funds, upon trust, after the death of the survivor of the husband and wife, and in the meantime subject to their life interests therein, in manner therein mentioned, (*inter alia*) as to two-sixth parts (minus £468) in trust for *Rosalind Harriet Butterworth*, her executors and administrators, for her separate use. And it was thereby declared that the aforesaid appointment of two-sixth parts of the trust funds, minus £468, was made to *Rosalind Harriet Butterworth* upon trust that she, her executors or administrators, should either permit the same to remain invested as she or they should receive the same, or should at her or their discretion invest the same as therein mentioned; and should stand possessed of the said two-sixth parts (minus £468), and of the investments representing the same, upon the following trusts within the period of twenty-one years, minus one day, from the death of the survivor of the husband and wife, viz., as to one-sixth part (minus £85), and the investments representing the same, upon the trusts therein mentioned; and as to the other

NORTH, J.
1893
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one-sixth part (minus £383), and of the investments representing the same, within the period of twenty-one years, minus one day, from the death of the survivor of the husband and wife, upon certain trusts for the benefit of Mrs. *Fletcher*. And it was thereby further declared that, subject to the trusts thereinbefore declared, and if and so far as such trusts should not exhaust the whole interest therein, Mrs. *Butterworth*, her executors and administrators, should be entitled to the two-sixth parts of the trust funds (minus £468) thereby appointed to her for her and their own use and benefit, for her separate use.

*Cozens-Hardy*, Q.C., and *Pauli*, for the Plaintiffs:—

On the question whether the fund appointed to Mrs. *Butterworth* on trust for Mrs. *Fletcher* ought to be transferred to Mrs. *Butterworth* or retained by the Plaintiffs as trustees of the settlement, the decision of your Lordship in *Scotney* v. *Lomer* (1) appears to conflict with that of Vice-Chancellor *Malins* in *Busk* v. *Aldam* (2). But, after what was said by Lord Justice *Cotton* in *Scotney* v. *Lomer* (3), though the Court of Appeal did not decide the case on that ground, it must be taken that the decision in *Busk* v. *Aldam* was correct, and, if so, it shews that the trustees of the settlement are the proper persons to hold the fund.

*Pauli*, for Mrs. *Butterworth*.

*C. E. E. Jenkins*, for Mrs. *Fletcher*.

1893. Nov. 10. NORTH, J.:—

Having regard to what was said in the Court of Appeal in *Scotney* v. *Lomer*, I must follow *Busk* v. *Aldam* if it applies to the present case. I think it clearly does apply. That being so, my answer to the question will be, that the fund ought not to be transferred to Mrs. *Butterworth*, but ought to be retained by the Plaintiffs as trustees of the original settlement.

Solicitors: *Wilde, Berger, & Moore*; *Brooks, Jenkins & Co.*

(1) 29 Ch. D. 535. (2) Law Rep. 19 Eq. 16.
(3) 31 Ch. D. 380.

W. L. C.

NORTH, J.
1893
Nov. 29.

## *In re* DRACUP.
## FIELD *v.* DRACUP.

[1891 D. 1074.]

*Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 6—*Set-off—Interest.*

Parties who had bought under liberty to bid, in a partition action, and had been allowed to set off part of the purchase-money against their respective shares, were charged with interest at 3 per cent. on the amounts set off.

THIS was an action by a beneficiary under the will of *Samuel Dracup* for (*inter alia*) a partition or sale of real estate devised by the will. An order was made for sale, giving the parties, other than the Plaintiff, who had the conduct of the sale, liberty to bid, directing the purchase-money to be paid into Court.

The real estate was sold in lots. Three of the Defendants, *George Dracup, Hannah Fox,* and *Ellen Moorhouse,* purchased part of the real estate at a sale made in pursuance of the order, and paid deposits on their respective purchase-moneys. An order was made on the 31st of January, 1893, allowing the Defendant *George Dracup,* to set off £3500, part of the balance of the purchase-money payable by him, against the share to which he was entitled of the estate of the testator; the Defendant *Hannah Fox* to set off £750, the balance of her purchase-money against her share of the testator's estate; and the Defendant *Ellen Moorhouse,* £220 10*s.*, the balance of her purchase-money, against her share of the testator's estate. And it was ordered, that such order was to be without prejudice to the question what interest (if any) should, as between the parties to the action, be charged against the said Defendants, *George Dracup, Hannah Fox,* and the said *Ellen Moorhouse,* by reason of such sums of £3500, £750, and £220 10*s.* being so set-off."

The action was now brought on on further consideration. The question was raised what interest the Defendants ought to be charged with in respect of the sums set off under the order of January, 1893.

NORTH, J.

1893

*In re* DRACUP. FIELD *v.* DRACUP.

*Cozens-Hardy*, Q.C., and *R. Watson*, for the Plaintiff:—

The principle is well established that when a party has been advanced before his co-beneficiaries he is charged interest at the rate of 4 per cent.: *In re Rees* (1); *Andrewes* v. *George* (2).

*Swinfen Eady*, Q.C., and *E. S. Ford*, for the Defendants:—

The right principle to apply is to see that no other person interested is injured. The fair thing to do would be to allow what the money would have earned if invested in Consols, that is, interest at the rate of $2\frac{3}{4}$ per cent.

NORTH, J.:—

I cannot order the Defendants to account for interest at 4 per cent.; but I will allow what is just as between the parties. A person who has been allowed to retain his purchase-money in his pocket is not intended to be a gainer thereby; on the other hand, he is not intended to lose, so far as the position of the other persons interested is not prejudiced. I think, therefore, the funds ought to be dealt with in the division as nearly as possible as if the money had been paid into Court and invested in Consols. If the money had been so invested it would not have earned exactly $2\frac{3}{4}$ per cent., the amount suggested by Mr. *Eady*, for Consols are not at par. What I shall do is to charge the purchasers, in account, with interest at 3 per cent. on the sums retained by them respectively.

Solicitors for Plaintiff: *Burn & Berridge*, agents for *Watson, Son, & Smith, Bradford.*

Solicitors for Defendants: *Johnson, Weatherall, & Sturt*, agents for *Wade, Bilbrough, Booth & Co., Bradford.*

(1) 17 Ch. D. 701. (2) 3 Sim. 393.

D. P.

## *In re* THE TRADE-MARK OF LA SOCIETE ANONYME DES VERRERIES DE L'ETOILE.

STIRLING, J.

1893

Oct. 27; Nov. 4.

*Trade-mark—Registration—Rectification—Mark resembling another already on Register—"Calculated to deceive"—"Person aggrieved"—Expunging—User—Patents, Designs and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 72, *sub-s.* 2, 90—*Patents, Designs and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 14.

*B. & Co.* carried on business in *London*, as dealers in window-glass, which they purchased in *Belgium* and shipped to *Australia* and other colonies. In 1876 they registered as a trade-mark the device of a star, which they had used in connection with their glass since 1875; and their glass was known in the trade by the designation of "*Star Brand.*" The Respondents, a Belgian glass manufacturing company, in 1885 registered in *Belgium*, as a trade-mark for glass, the device of a red star, which they had used there since 1880. In 1890 they registered in *England*, as a trade-mark for window-glass, the words "*Red Star Brand.*" They sent large quantities of glass to *England* in cases marked with a red star, but did not deal directly with the colonies. *B. & Co.* having discovered that glass was being sold in *New Zealand* under the description of "*Red Star Brand*" moved to expunge the Respondents' mark from the register:—

*Held*, that if *B. & Co.* had been opposing the registration of the Respondents' mark, the Comptroller would have been justified in refusing to register it on the ground that it so nearly resembled *B. & Co.'s* mark as to be calculated to deceive. The entry on the register of the Respondents' mark was therefore made "without sufficient cause," and *B. & Co.*, being "persons aggrieved" within the meaning of s. 90 of the *Patents, Designs and Trade Marks Act*, 1883, were entitled to have it expunged from the register:

*Held*, also, that an injunction limited to user in the colonies, as granted in *Barber* v. *Manico* (1) would not afford sufficient protection to *B. & Co.*

# MOTION.

This was an application, under s. 90 of the *Patents, Designs and Trade Marks Act*, 1883, on behalf of *Henry Brooks & Co.*, of *Ethelberga House, Bishopsgate Street Within*, asking for an order that the Register of Trade Marks might be rectified by expunging therefrom a trade-mark (No. 96,732) registered on the 20th of March, 1890, by the Respondents, *La Société Anonyme des Verreries de l'Etoile, Marchienne, Belgium.*

(1) 10 Rep. Pat. Cas. 93.

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*In re* TRADE-MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ETOILE.

The Applicants and their predecessors had for many years carried on a business in *London* as Australian merchants and exporters, and they dealt largely in window-glass. Of this business the ordinary course was as follows:—Messrs. *Brooks & Co.* purchased in *Belgium* glass which had been manufactured in that country; the glass so purchased was delivered to them at *Antwerp*, and shipped by them to this country, whence it was again shipped by them to various places (chiefly in *Australia* and *New Zealand*), in execution of orders received by them. For the purposes of this business they, in the year 1876, caused to be registered various trade-marks, and amongst them that (No. 2980) of a star, in connection with window-glass. According to the evidence, this trade-mark was in use at least as early as 1875; and the Applicants' glass, to which the mark was affixed, was in that year and had ever since been ordered by their customers by the designation of the "*Star Brand.*" The Respondents were a Belgian company engaged in the manufacture of glass. Their predecessors had registered in *Belgium* as a trade-mark for glass on the 27th of January, 1885, the device of a red star with the letters "*L. L.*" underneath, and on the 26th of October, 1892, the same device without those letters. The device had not been made an exhibit, and was not produced in Court. On the 20th of March, 1890, the Respondents registered in *England* as a trade-mark for window-glass not the device registered in *Belgium*, but simply the words "*Red Star Brand,*" and this was the mark the Applicants sought by their motion to expunge. It appeared that the Respondents and their predecessors had used the device registered in *Belgium* as a trade-mark ever since 1880, and had during that period sent to *England* large quantities of glass in cases bearing the device of a red star upon them. It was stated by their manager (M. *Armand Lannoy*) that they did not ship to *Australia* or the English colonies. In the course of the present year the Applicants were informed by an agent of theirs in *New Zealand* that window-glass was being offered there for sale as "*Red Star Brand.*" They therefore made inquiries, and in consequence learnt for the first time of the registration of the Respondents' mark. Immediately thereafter the present notice of motion was given.

*Hastings*, Q.C., and *John Cutler*, for the motion :—

The Respondents' mark so nearly resembles our mark as to be calculated to deceive, and consequently it ought to be expunged. The Respondents cannot shew any such user as would disentitle the Applicants to have the mark expunged.

*Mouson & Co.* v. *Boehm* (1) was an unsuccessful application to expunge, but there the applicant was not on the register at all, and there had been no user of his mark for years, while the respondent in ignorance of the applicant's mark had established a very large trade under the mark sought to be expunged. None of those elements exist in the present case.

User in a foreign country does not give any right to registration in *England*: *Re Münch's Application* (2). If the evidence now before the Court had been before the Comptroller he must have refused to register the Respondents' mark.

*Moulton*, Q.C., and *Roger Wallace*, for the Respondents :—

The Applicants have failed to shew user of their mark in *England*. The words we have registered are wholly inapplicable to their mark. We submit that if an injunction were being sought for against us, it would be limited to restraining the use of our mark in the Colonies, to which the Applicants' trade is confined: *Barber* v. *Manico* (3), *Orr-Ewing & Co.* v. *Johnston & Co.* (4).

[STIRLING, J., referred to *Johnston & Co.* v. *Orr-Ewing & Co.* (5).]

*Hastings*, in reply.

1893. Nov. 4. STIRLING, J. (after stating the facts, continued) :—

This application is made under sect. 90 of the *Patents, Designs and Trade Marks Act*, 1883, which empowers the Court to expunge any "entry made without sufficient cause" in the register upon the application of "any person aggrieved" by such entry. It was

(1) 26 Ch. D. 398.
(2) 50 L. T. (N.S.) 12.
(3) 10 Rep. Pat. Cas. 93.
(4) 13 Ch. D. 434, 464.
(5) 7 App. Cas. 219.

STIRLING, J.

1893

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contended on behalf of the Applicants that if the evidence adduced on this application had been brought before the Comptroller prior to registration of the Respondents' mark their application to register would have been refused, and that nothing has occurred to prevent the Court exercising the discretion vested in it by sect. 90 by expunging the mark. I shall first consider how the case would have stood if the present Applicants were now opposing the registration of the Respondents' trade-mark. Sect. 72 of the Act of 1883 (as modified by the Act of 1888) provides that, except with the leave of the Court, "the Comptroller shall not register with respect to the same goods or description of goods a trade-mark having such resemblance to a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." Physically the trade-mark registered by the Respondents has no resemblance to the mark of the Applicants. In the absence of opposition the Comptroller has (generally speaking) no means of judging of anything but the physical resemblance of two marks. If, however, it is brought to his notice by the evidence adduced by an opponent that, even though the two marks are not physically similar, there is a reasonable probability of the public being misled into buying one thing when they think they are buying another, I apprehend that it would be his duty to refuse registration. On this I may refer to what was laid down by the present Lord Chancellor and by Lords *Watson* and *Macnaghten* in *Eno* v. *Dunn* (1). Now a large number of the affidavits filed on behalf of the Respondents contain statements of which the following is a sample. Mr. *G. C. Warden*, a glass factor, of *Queen Victoria Street*, says: "I know and am well acquainted with the red star device which has been used for the last nine years to denote the glass manufactured by the *Société Anonyme des Verreries de l'Etoile.* I have purchased during the said period, in considerable quantities, glass so marked from the *Société Anonyme des Verreries de l'Etoile.* The said trade-mark of the *Société Anonyme des Verreries de l'Etoile* is well known in the trade and with the public as denoting goods of their manufacture, and no other. If I was asked for glass bearing a star

(1) 15 App. Cas. 252.

trade-mark I should believe that glass of the *Société Anonyme des Verreries de l'Etoile* was wanted, and I should purchase and supply the same accordingly." It is to be observed there that he says "if I was asked for glass bearing a star trade-mark" not a red star trade-mark, which makes the evidence the more emphatic. It further appears that the glass offered for sale in *New Zealand* as red star brand was ordered by a *New Zealand* firm from a *London* firm of merchants, and was supplied by them in pursuance of the order. In this state of things it is said by the Applicants that if some firm in *New Zealand* intending to purchase their glass were to order it under the description of glass of the star brand from some English merchant acquainted with glass of the Respondents' manufacture, and knowing it as (in the language of the Respondents' affidavits) "bearing a star trade-mark," such English merchant would supply his customer with the Respondents' glass when the Applicants' was intended to be purchased. I think there is a reasonable probability of such an event happening. It is a striking circumstance that the Respondents have not registered in *England* the device of a star which they have twice registered in *Belgium*. The reason is not given in the affidavits, but was stated by counsel to be that, inasmuch as registration in one colour gives a right to the registered owner to use the device in any other colour (see sect. 67 of the Act of 1883), it was found that the device registered by the Respondents in *Belgium* could not be placed on the English register. The inference is that the Respondents' device, which I have not seen, had, irrespective of colour, such resemblance to some mark already on the register, with respect to the same description of goods as to be calculated to deceive. The Respondents being thus unable to place their device of a star on the register have attempted to secure indirectly the same benefit as would have accrued to them from the registration of that device, and have registered as their trade-mark in *England* the words "*Red Star Brand.*" I do not impute to the Respondents any dishonest intention of appropriating the Applicants' business, and, as at present advised, I see no reason why they should not do what they have done, provided only the like evil does not follow from the registration

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of those words as would have resulted from the registration of the device of a star. In my opinion, however, it is made out that there is a reasonable probability of such like mischief befalling the Applicants; and if the present evidence had been brought before the Comptroller when the Respondents' mark was sought to be registered, I think that registration ought to have been refused. This is an application to expunge. The burden of proof may now lie on the Applicants; if so, they have, in my opinion, satisfied it. Under these circumstances I think that, in the language of sect. 90 of the *Patents, Designs and Trade Marks Act*, 1883, the entry of the Respondents' mark has been made without sufficient cause, and that the Applicants are "persons aggrieved" by such entry. The power conferred by that section is, however, discretionary; and it remains to be considered whether there are any sufficient reasons for exercising the discretion vested in the Court adversely to the Applicants. In the first place, I think that no objection can be founded on delay in making the application. The Applicants only heard of the trade-mark of the "*Red Star Brand*" a few weeks before the notice of motion was given. Again, the Applicants registered their mark in 1876; and the evidence satisfied me that it has been continuously used by them from that year, and indeed from 1875. I further think that the Respondents were aware of the existence of the Applicants' mark when they registered their own. The affidavit of *M. Armand Lannoy*, the Respondents' manager, on that point is very cautiously expressed. He says: "I never knew the star mark to be used on the goods of Messrs. *Henry Brooks & Co.*, which were also supplied from *Belgium*. The trade-mark generally used for that purpose consisted of the device of a swan, and was traced thereon by the various makers in the ordinary course of their business." That statement seems pregnant with the admission that the witness knew of the existence of the Applicants' mark, though he says that he did not actually know it to be applied to their goods. Bearing in mind the reason assigned for the non-registration in *England* of the Respondents' device of a star, I cannot doubt that the Respondents' advisers, and, through them, the Respondents, were perfectly aware of the registration of

the Applicants' star mark when they registered the words "*Red Star Brand.*" It was said that there was no user of the mark by the Applicants in *England.* No doubt their trade is with the colonies, and not with persons in this country, but they do, in fact, apply the mark to goods which are shipped by them from this country. If it were necessary to decide the point I should say that this was a user of the mark in this country; but the real question is whether the Applicants are persons aggrieved by the entry of the Respondents' mark; and, according to the decisions, they are such, if it is made out that they are likely to bo hampered or prejudiced in the conduct of their business by such entry: See *In re Apollinaris Company's Trade-marks* (1); *In re Powell's Trade-mark* (2). For the reasons already given I think that this is established. It was further said that, if the Applicants were seeking to restrain the Respondents from using their mark, an injunction would not be granted in general terms, but would be limited to user in the colonies. This argument is based on the law as stated by Lord Justice *Cotton* in *Orr-Ewing & Co.* v. *Johnston & Co.* (3), and applied by Lord Justice *A. L. Smith* in the recent case of *Barber* v. *Manico* (4). Having regard, however, to the course of trade proved in this case, under which goods sold by the Respondents to English merchants may be resold as glass bearing a star brand to customers of the Applicants in the colonies, I do not see how a limited injunction would give complete relief to the Applicants. At all events, no form of undertaking or entry in the register has been suggested which would sufficiently protect the Applicants' rights. Under all these circumstances I think the Applicants are entitled to the order which they ask.

Solicitors: *Ernest Salaman & Co.; Paddison, Fullilove, Cummins, & De la Chapelle.*

(1) [1891] 2 Ch. 186.
(2) [1893] 2 Ch. 388.
(3) 13 Ch. D. 434, 464.
(4) 10 Rep. Pat. Cas. 93.

G. A. S.

KEKEWICH, J.

1893 Nov. 3.

# IVES & BARKER v. WILLANS.

[1893 I. 1062.]

*Arbitration—Action—Staying Proceedings—Statement of Claim, Requiring delivery of—"Step in Proceedings"—Practice—Rules of Supreme Court,* 1883, *Order* xx., *r.* 1 (*b*)—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

A "step in the proceedings" in sect. 4 of the *Arbitration Act,* 1889, means some application to the Court by summons or motion, and does not include an application by letter or notice from one party to another, or by correspondence between their respective solicitors. Accordingly, where a defendant to an action relating to a matter agreed by the parties to be referred to arbitration has, under *Rules of Supreme Court,* 1883, Order xx., rule 1 (*b*), given notice that he requires the delivery of a statement of claim, he is not thereby precluded from applying, under the section, to stay the proceedings in the action, such a notice not being a "step in the proceedings" within that section.

*Chappell* v. *North* (1) and *Brighton Marine Palace and Pier, Limited* v. *Woodhouse* (2) considered.

## ADJOURNED SUMMONS.

On the 22nd of July, 1889, the Defendant, *John William Willans,* entered into a contract with the *Liverpool Overhead Railway Company* for the construction of a high-level railway. The contract provided that any question or dispute arising between the parties out of the subject-matter of the contract should be referred to and decided by the company's engineers.

On the 24th of August, 1889, the Defendant entered into a sub-contract with the Plaintiffs, Messrs. *Ives & Barker,* for the erection and fitting up by them of the iron-work required for the railway, the sub-contract providing that the arbitration clause in the original contract should be treated as applicable to and repeated, *mutatis mutandis,* in the sub-contract.

On the 1st of July, 1893, the Plaintiffs issued the writ in this action against the Defendant, claiming (amongst other relief) specific performance of the sub-contract, and damages for alleged breach thereof.

The Defendant duly appeared to the action, and, at the time

(1) [1891] 2 Q. B. 252. (2) [1893] 2 Ch. 486.

of entering appearance, gave the Plaintiffs notice in writing requiring a statement of claim to be delivered, which had not yet been done.

Subsequently, on the 20th of July, 1893, the Defendant took out the present summons, asking that, pursuant to sect. 4 of the *Arbitration Act*, 1889, all further proceedings in the action might be stayed, on the ground that the matters in difference had been agreed to be referred to arbitration, and that he, the Defendant, was ready and willing to submit to arbitration.

The question was whether the Defendant had, by requiring the delivery of a statement of claim, "taken a step in the proceedings" within the meaning of sect. 4 of the *Arbitration Act*, 1889, and so precluded himself from making the application to stay.

*Warmington*, Q.C., and *Bramwell Davis*, for the Defendant:—

We submit that we are entitled to an order, under sect. 4 of the *Arbitration Act*, 1889 (1), for a stay of proceedings, the matters in dispute being covered by the arbitration clause in the sub-contract.

*Renshaw*, Q.C., and *A. F. Peterson*, for the Plaintiffs:—

The notice requiring the delivery of a statement of claim was given by the Defendant under Rules of Supreme Court, 1883, Order xx., rule 1 (*b*). It is not compulsory upon a plaintiff to deliver a statement of claim, but under rule 1 (*d*) he may deliver one voluntarily, though, under rule 1 (*e*), at the risk of costs if

(1) Sect. 4 of the *Arbitration Act*, 1889, is as follows: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

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he does so unnecessarily. Accordingly, in giving a notice requiring a statement of claim, the Defendant is electing that the action shall go on—that he desires it to proceed. That is therefore "taking a step in the proceedings" within sect. 4 of the Act, and thereby the Defendant forfeits his right to stay. A summons for particulars, or an application for leave to administer interrogatories, is a "step in the proceedings" within the section: *Chappell* v. *North* (1); though an application by letter for extension of time for putting in a defence has been held not to be so: *Brighton Marine Palace and Pier, Limited* v. *Woodhouse* (2).

[KEKEWICH, J., referred to *Adams* v. *Cattley* (3).]

KEKEWICH, J.:—

I need not call on you, Mr. *Warmington.*

This is an application by the Defendant for a reference to arbitration under the 4th section of the *Arbitration Act,* 1889, and it is resisted on behalf of the Plaintiffs on this ground. It is said that the Defendant, before applying to the Court to stay the proceedings, has taken a step in the action—a step in the proceedings, within the meaning of the 4th section. He has not delivered any pleadings, but it is said he has taken a step. What he did was this: when he appeared he required a statement of claim to be delivered. It was for him, under advice, to consider whether a statement of claim should be required or not. He might have left it to the Plaintiffs to determine whether they would at their own risk deliver a statement of claim, or rely on the indorsement of the writ, or he might have himself required a statement of claim; he took the latter course, and probably he was well advised in doing so. He desired to have the claim against him formulated, perhaps not really more completely, but more precisely than was possible on the indorsement of the writ. He was entirely within his rights. Does that debar him from now moving to have a stay of proceedings with a reference to arbitration? Fortunately

(1) [1891] 2 Q. B. 252, 256. (2) [1893] 2 Ch. 486.
(3) 40 W. R. 570.

we have some authority on the question, and, though the authority is not directly on all fours with the present, it strongly supports the view which I should desire to take independently of authority. I cannot myself think "a step in the proceedings" includes applications between the parties by letters between their solicitors, or really anything short of some application to the Court, or some act in the Court. I pass by without further comment the case of *Adams* v. *Cattley* (1), where the point was raised, because, though raised, it was not there decided. The point was raised, but not precisely decided, in the case of *Chappell* v. *North* (2), before the Divisional Court, consisting of Mr. Justice *Denman* and Mr. Justice *Wills*. They held that an application for leave to administer interrogatories was a step in the proceedings; and so also a summons for particulars of a counter-claim; both illustrating what I have said about an application to the Court. But Mr. Justice *Denman* used language which pointed to a letter or notice asking for a statement of claim, such as I have here, not being a step in proceedings; and Mr. Justice *North*, in a later case of *Brighton Marine Palace and Pier, Limited* v. *Woodhouse* (3), held that an application by letter for an extension of time to put in a defence is not taking a step, and he relied on Mr. Justice *Denman's* language as pointing to that conclusion. I understand the principle of Mr. Justice *North's* decision to be, that negotiation or correspondence between the parties or their solicitors, although referring to the conduct of the action, and though resulting in the delay of this or that proceeding, is not a step in the proceedings; and that, in order to take a step in the proceedings, you must have something like a summons for particulars, or some other summons or motion before the Court.

In accordance with those cases, as I understand them, I hold what certainly is my opinion independently of authority—that requiring a statement of claim is not a step in the proceedings such as to preclude the Defendant from moving for a reference to arbitration.

[His Lordship then made an order under sect. 4 of the *Arbitration Act*, 1889, staying all proceedings in the action, except

(1) 40 W. R. 570. (2) [1891] 2 Q. B. 252.
(3) [1893] 2 Ch. 486.

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as to certain claims in respect of matters which were outside the sub-contract and the submission to arbitration. No order as to costs.]

Solicitor for Plaintiffs: *James Kirkley*, agent for *Davidson & Barker, South Shields.*

Solicitors for Defendant: *Addleshaw, Warburton, & Trenam*, agents for *Addleshaw & Warburton, Manchester.*

G. I. F. C.

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[1893 W. 403.]

*Solicitor Trustee—Professional Charges—Opening Settled Account.*

*S. & S.*, the trustees and executors of a will, who were solicitors carrying on business in partnership and were authorized by the will to charge for professional business done by them for the estate, wound up the estate and sent an account to the five residuary legatees with a letter saying that, if they would call at the office of the executors on a day named, the executors would give them any explanations they might require, and would hand them over cheques for their shares of the residue. The account was not a complicated one, and among the items was, "Paid Messrs. *S. & Co.* costs relating to executorship and counsel's fees and payments made by them, £116 17*s.* 2*d.*" The ultimate balance shewn was £331 3*s.* 4*d.*, the bulk of the testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined and approve of the foregoing account," received cheques for their shares, and executed a release to the trustees and executors. The trustees and executors never informed the residuary legatees that they were entitled to have a bill of costs delivered, and to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, and to have a bill of costs delivered and taxed. On production of documents there were found in the costs ledger of the solicitors items which came to more than the amount charged for costs in their account, there was no evidence of excessive charge beyond a deposition by an experienced solicitor's clerk that in his opinion at least one-sixth would be taxed off the amount of costs appearing in the ledger, and there was no proof of error in the rest of the account. *Romer*, J., dismissed the action:—

*Held*, on appeal, that although it was the duty of the solicitor trustees to have informed the residuary legatees that they were entitled to have a bill of costs, and if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; that in order to do so it was necessary to shew that injustice would be done by allowing the settled account to stand; that if excessive charges had been shewn the account must have been opened; but that as no error had been shewn the action had rightly been dismissed.

*WILLIAM WEBB* the elder, a builder, by will dated the 26th of April, 1881, after bequeathing seventeen leasehold houses to the Defendants *S. F. Still*, and *E. R. Still*, who were solicitors and

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co-partners, upon trusts therein mentioned for the benefit of the testator's five children and their respective issue, devised and bequeathed his residuary personal estate and his real estate, charged with his debts and funeral and testamentary expenses, unto and to the use of his five children in equal shares. The testator declared that the *Stills* and every future trustee or executor of his will who should be a solicitor might act as solicitor to his estate, and should be entitled to charge and should be paid for all business done by him in relation to the administration of his estate or the execution of the trusts of his will, and especially in relation to the several contracts for works and buildings therein referred to and contained in a building agreement of the 13th of May, 1875, in the same manner as if he had not been a trustee or executor, and for the time which he should necessarily or properly employ in the execution of his duties as trustee or executor. The testator appointed the two *Stills* executors of his will.

The testator died on the following day, and his will was shortly afterwards proved by the *Stills*.

On Saturday the 23rd of June, 1883, the executors wrote and sent to each of the four surviving children and the administratrix of one who was dead, the following letter:—

"The executors of the late Mr. *Wm. Webb* are now in a position to wind up his estate, so we are sending you herewith a copy of the executorship account, shewing that the balance to be divided amongst the residuary legatees is £331 3*s.* 4*d.*, your fifth share of which is £66 4*s.* 8*d.*

"We also enclose an account of payments the executors have made on your behalf which will have to be deducted from your share of the residue.

"If you will call here on Tuesday next at two o'clock we will give you any explanation you may require as to the accounts, and hand you a cheque for the balance due to you."

Along with each copy of this letter was sent an account of the receipts and payments of the executors. It appeared from this account, which was neither long nor complicated, that these receipts amounted to £1548 18*s.* 6*d.*, and the disbursements to

£1217 15*s.* 2*d.* Among these were the three following items: To *Still & Co.* for costs relating to obtaining probate, £24 2*s.*; their costs against the testator up to his death, £19 17*s.* 4*d.*; and "Paid Messrs. *Still & Sons* costs relating to executorship and counsel's fees and payments made by them, £116 17*s.* 2*d.*" No particulars were given to shew how any of these three sums were made up. The balance shewn was £331 3*s.* 4*d.*, divisible among the five residuary legatees.

The residuary legatees came to the office of the executors, signed at the foot of the account a memorandum, "We have examined and approve of the foregoing account," received cheques for their shares of the balance, and, on the 28th of June, executed a release discharging the executors from all claims in respect of the residuary estate.

In 1892 three of the residuary legatees were advised that they probably could get a considerable part of the costs taxed off, and on the 26th of September, 1892, they obtained a common order for taxation, which, on the 28th of January, 1893, was discharged on the application of the solicitors. In February, 1893, they commenced the present action, alleging that on the 28th of June they believed themselves to be only signing receipts for the sums they received; that the letters of the 23rd of June did not mention any release, and that no draft or copy of the release was at any time furnished to them, nor was any intimation given to them that they would be asked to sign any release, nor was the release ever read over or explained to them; that no particulars of the bills of costs had ever been furnished to them, and that such bills were grossly excessive in amount. The Plaintiffs claimed a declaration that the release was not binding, administration of the personal estate, and delivery and taxation of the bills of costs.

In the course of the action the Plaintiffs obtained production of documents. The costs ledger of the firm contained particulars of the charges for business relating to the estate, including the costs relating to obtaining probate. These charges amounted to £148 7*s.* 6*d.*, which exceeded by £7 8*s.* 4*d.* the amount of the two lump sums of £116 17*s.* 2*d.* and £24 2*s.* charged in the account rendered to the residuary legatee. An experienced

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clerk of the Plaintiffs' solicitor deposed that he believed at least one-sixth would be taken off the costs on taxation, meaning apparently off the costs appearing in the ledger. The Plaintiffs, however, did not prove any gross overcharge, nor shew any error in the items of the account which did not consist of costs. Mr. Justice *Romer* dismissed the action. The Plaintiffs appealed.

*Oswald*, Q.C., and *Pochin*, for the Appellants :—

Our grounds of appeal are—(1.) that sufficient time was not given to the beneficiaries to examine the accounts; (2.) that they had no independent advice; (3.) that the accounts and the release were not properly read over and explained to them; (4.) that power to charge for professional services was inserted in the will without the authority of the testator; (5.) that the charges for costs were extravagant, and that by including them in the release the trustees prevented the beneficiaries from having them taxed without first setting aside the release. We shewed some errors in the accounts at the trial; but we contend that, although as a general rule settled accounts cannot be set aside without shewing *primâ facie* some errors in the accounts, that rule does not apply between trustees and their *cestuis que trust*, or between solicitors and their clients. At all events, we are entitled to tax the costs included in the release, for a solicitor trustee is bound to give the fullest explanation on all points to his *cestuis que trust*, and cannot escape that responsibility by including his bill of costs in a release. There has been no laches or acquiescence in this case, for the beneficiaries never had any opportunity of obtaining information: *Bennett* v. *Colley* (1); *Welles* v. *Middleton* (2); *Morgan* v. *Minett* (3); *Ward* v. *Sharp* (4); *Coleman* v. *Mellersh* (5); *In re Fish* (6); *Todd* v. *Wilson* (7).

*Bousfield*, Q.C., and *Yate Lee*, for the Defendants :—

All the grounds alleged for setting aside the release were carefully gone into before Mr. Justice *Romer*, and the learned

(1) 2 My. & K. 225, 232.
(2) 1 Cox, 112, 124.
(3) 6 Ch. D. 638.
(4) 32 W. R. 584.
(5) 2 Mac. & G. 309.
(6) [1893] 2 Ch. 413.
(7) 9 Beav. 486.

Judge held that they were disproved. The only real question is whether the costs and charges can be now gone into: that is the only object of the action. But we contend that before opening the account between the solicitor and his clients the clients must shew some erroneous charges. This the Appellants have not done. In fact, the items entered in the solicitor's own books for work done amount to about £8 more than he has actually charged. No case cited by the Appellants comes up to the propositions they seek to establish. *Todd* v. *Wilson* (1) comes nearest, and the words of the judgment to some extent fit the present case; but the circumstances were entirely different —the solicitor there had no right to make professional charges, so that the whole charge was an imposition. The decision in *In re Fish* (2) does not bear on the present case. It was there contended that a settlement by trustees of the bill of professional charges of one of themselves who was a solicitor precluded the *cestuis que trust* from disputing the amount, and that contention was overruled. In *Coleman* v. *Mellersh* (3) a gross overcharge was proved, and the account was opened on that ground. The cases as to a solicitor taking a benefit from his client have little, if any, bearing on the question now before the Court. We rely on the following cases: *Stedman* v. *Collett* (4), where it was held that the settlement of a solicitor's bill for a fixed sum is valid, and will not be disturbed when it has been entered into fairly and with proper knowledge on both sides. In *Turner* v. *Hand* (5) a solicitor gave a general estimate of costs due to him without specifying particulars. The client agreed to it and paid it. Three years afterwards he filed a bill to obtain delivery and taxation of a bill of costs, alleging flagrant overcharges which he did not prove. The bill was dismissed. In *Ex parte Hemming* (6) the amount of costs was agreed to and allowed in account. Afterwards a bill of costs was asked for and delivered. It was larger in amount than the sum agreed, and the Court refused taxation. We say that unless some unfair advantage is taken the Court will not reopen the matter merely because there

(1) 9 Beav. 486.
(2) [1893] 2 Ch. 413.
(3) 2 Mac. & G. 309.
(4) 17 Beav. 608.
(5) 27 Beav. 561.
(6) 28 L. T. (O.S.) 144.

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may be items which would be taxed off. This is not a case between solicitor and client, but a case of trustees settling accounts with their *cestuis que trust*, and after this length of time the Court will not interfere unless there is something to shew that the trustees took an unfair advantage.

*Oswald*, in reply :—

This case cannot be decided in favour of the respondents without overruling *Todd* v. *Wilson* (1). The Appellants cite no case of a solicitor trustee being allowed to retain the amount of his charge without delivering a bill. The solicitors never told the *cestuis que trust* that they were entitled to have a bill delivered and to have it moderated. There are a number of items in the costs ledger which would be disallowed on the principle of *In re Chapple* (2). In *Coleman* v. *Mellersh* (3) the account was opened because there was an improper charge of £75. What difference is there between charging a lump sum and charging a number of smaller improper items? The cases cited by the Respondents do not apply. In *Stedman* v. *Collett* (4) it is required that both sides should have proper knowledge, which here the Appellants had not. The other cases are cases under the *Solicitors Act*, and taxation under the Act is governed by the statutory provisions. As to lapse of time, it is no defence in a case circumstanced like this: *Ward* v. *Sharp* (5); *Lindsay Petroleum Company* v. *Hurd* (6); *Erlanger* v. *New Sombrero Phosphate Company* (7).

LINDLEY, L.J. :—

This is an appeal from the refusal by Mr. Justice *Romer* to set aside an account and a release settled and signed ten years ago. I think that, on the materials before us, he was quite right.

The position of the parties was this. A gentleman had died leaving a will appointing the two Defendants, the Messrs. *Still*, who were solicitors, his trustees; and that will contained a clause

(1) 9 Beav. 486.
(2) 27 Ch. D. 584.
(3) 2 Mac. & G. 309.
(4) 17 Beav. 608.
(5) 32 W. R. 584.
(6) Law Rep. 5 P. C. 221.
(7) 3 App. Cas. 1218, 1279.

enabling them to make what I will call shortly professional charges for their services. The Plaintiffs are three of his residuary legatees. The value of his residuary property appears to have been about £1500. The solicitors wound up his affairs, and on the 23rd of June, 1883, they wrote this letter to the residuary legatees. [His Lordship read the letter, which is given above.]

The account which accompanied this letter is, on the face of it, a clear, full, and fair account of what had been done in the winding-up of the estate—a full debtor and creditor account, intelligible to anybody who is capable of understanding an account at all. One item in it is, "Paid Messrs. *Still & Sons* costs relating to the executorship, £116 17*s.* 2*d.*"

The residuary legatees, having got this account, sign at the foot of it a memorandum, "We have examined and approve the foregoing account." The date is not put down, so I say nothing about the date. It may have been the 28th of June, when the release was executed. After having had the account, and after having had an opportunity of putting such questions as they thought fit to put, they sign this memorandum of approval. On the 28th of June, 1883, they signed a release releasing the trustees and executors from all demands in respect of the residuary estate. They did that upon the receipt by them of their shares of the residue.

Let us see what it is, if anything, that was wrong in that transaction. The duty of Messrs. *Still*, who were solicitors and trustees, was difficult to perform. When solicitors who are trustees have power to charge their costs, they ought to be very particular; and in strictness, what they ought to have said to the residuary legatees, and what, according to the evidence, they did not say, was this: "You see we have charged you £116 for the costs. You are entitled to ask us to give you a detailed bill of those costs, and, moreover, you are entitled to have that bill taxed if you think proper." Although the residuary legatees were not Messrs. *Still's* clients upon a retainer, so that they could make out a bill of costs and sue them for it, yet in their position of trustees and solicitors it was their duty in strictness to have given these persons the information which I have stated,

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and this they failed to do. What is the consequence of that? An account settled and a release executed cannot be set aside for the asking. What is necessary in order to set aside a settled account or a release, or both together, when the release proceeds upon the footing of an account? It is essential to shew that there has been some injustice done—to shew that there has been some fraud, some pressure, some overcharge, something wrong to cloak up which the release has been obtained. Prove that, and the release cannot stand. If, then, it could be shewn in this case that any unfair advantage whatever had been taken of these persons, and if a single impartial competent witness had been called to say, looking at what is called the costs ledger, and looking at what was done, that £116 was an improper sum, I think, subject to the question of time, that these residuary legatees would have been entitled to relief. But they do not do anything of the sort. Having got discovery of documents, they find it utterly impossible to substantiate or maintain any attack whatever upon this account except the item of costs. There is not a single error found, there is not a tittle of evidence to shew that there is any mistake, either of omission or charge, in that part of the bill which relates to the winding up of the testator's estate, and I take it now, after all the discovery which has been obtained in this suit, that that part of this account is unassailable, and is straightforward, honest, and correct.

But then they attack this item of costs; and how do they do it? They treat Messrs. *Still* as having sent in a bill containing the items which are found in what is called the costs ledger. But Messrs. *Still* have not done so. It is not to be assumed that if they had sent in a bill they would have sent in a copy of the items in their ledger. What is to be assumed is, that if they had sent in a bill, they would have taken care about framing it. The real truth is, they have never furnished a bill. They had asked these people to allow these costs at £116, and it was perfectly competent for them to do so. I have already pointed out that they ought in strictness to have given more information than they did; but what ground have we for supposing that £116 is an exorbitant or improper charge? To my mind, there

is not the slightest evidence to shew anything of the sort. What we have to ask ourselves is this: Is it justice to set aside a release or a settled account ten years after its date upon a surmise that a charge may be unreasonable, when there has been every opportunity of proving that it is unreasonable, and not a tittle of evidence is adduced to shew that it is?

In my opinion the judgment of Mr. Justice *Romer* was correct, and this is an action that ought never to have been brought. The appeal will be dismissed with costs.

A. L. SMITH, L.J.:—

I am of the same opinion; but I wish to make a few remarks in consequence of the way in which this case has been presented to us against Messrs. *Still.*

This is an action brought to open a transaction which took place about ten years ago. The settlement and release now impeached were preceded by a letter of a most proper kind, which has been read by Lord Justice *Lindley.* Everything is in order, except one matter to which I will presently refer. The five beneficiaries have the account sent to them; they have the opportunity of investigating that account, and of asking for any explanation; they presumably having investigated that account sign their approval of it as being accurate and correct, and in addition to that they sign a release, releasing from all demands in respect of the residuary estate the Messrs. *Still,* who had been acting as executors and trustees of the testator. That took place as long ago as June, 1883. How and under what circumstances nine-and-a-half years afterwards, three of these five beneficiaries find out that the residuary legatees did not understand the release, and that they did not understand the settled account, for that they were illiterate and poor and what not, as is stated by the Plaintiffs' counsel, I do not pause to inquire, though I have my own suspicions on the subject.

Now, what happened? These proceedings are taken by a solicitor, Mr. *Chapman,* at the instance of these three to get a bill of costs delivered by Messrs. *Still,* and to have it taxed. The first proceeding was the common order to tax, which was entirely out of order, and that having failed he brings this action. In

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this action imputations have been made upon Messrs. *Still* which ought not to have been made, and I wish to state this from the Bench. One imputation which has been made is that they for their own benefit got a dying man to insert in the last moments of his life a clause in the will allowing them to charge solicitor's costs, they being trustees and solicitors under his will. This imputation is shewn to be utterly unfounded.

[His Lordship, after dealing with some other attacks on the conduct of the Messrs. *Still*, proceeded:—]

I entirely agree with Mr. Justice *Romer*, on the evidence in this case, that there has been nothing shewn to impeach the honour, integrity, or honesty of Messrs. *Still* in winding up this estate, and that these accounts ought not to be reopened.

But there is one point remaining. It is admitted that Messrs. *Still* did not tell the beneficiaries that they were entitled to have a bill of costs, and that if they liked they might have it taxed. They did not do that; but I have always understood that to open a settled account gross error almost amounting to deceit must be established. If that be too high, it is quite clear that you cannot have a settled account opened by the Court merely for the asking, but there must be some ground for shewing that the man who seeks to open it after a lapse of time has through some grave error been damnified. I am not going to repeat what Lord Justice *Lindley* has said on that point; but it seems to me that there is no evidence on which we could hold that the £116, or the £19, or the £24 were excessive charges for the work done by the Messrs. *Still*. The criticisms which Mr. *Oswald* most ably made on the different items were satisfactorily answered by Mr. *Bousfield*, who said that there was no bill of costs ever made out at all, and that the bill of costs which would be sent in, if one were ordered, would be something very different from a copy of the items in the ledger. Even if a bill consisting of those items were delivered the most that the clerk of the Plaintiffs' solicitor, Mr. *Chapman*, can screw himself up to is, that if it was taxed, one-sixth or more would come off; the result of which would be that these beneficiaries would get about £3 12*s*. apiece.

I agree with the judgment of Mr. Justice *Romer*.

Davey, L.J.:—

I am not prepared to differ from the other members of the Court as to the result of this appeal; but I must confess that I do not feel quite so clear about it as my learned Brethren. Nothing that is decided in this case will in any way impugn or impeach those sound doctrines relating to transactions between trustees and *cestuis que trust* which have been laid down in previous cases. The question in this case is one between trustees and *cestuis que trust.* The law imposes upon trustees taking a benefit from their *cestuis que trust* the obligation of putting their *cestuis que trust* in point of information in the same position as they are themselves and none the less when the trustees have employed themselves, as solicitors to do work on behalf of the trust and some of the charges in question are charges which they have retained for their own benefit in remuneration for such employment. I do not think that there is any magic in the trustees being solicitors. I should say exactly the same if they were surveyors or accountants. Wherever a trustee employs himself, in my opinion he ought to give the fullest information to his *cestuis que trust* with regard to any sum which he retains out of the trust estate for his remuneration for those services.

But the question is whether the Plaintiffs in the present case have, by their pleadings and their evidence, made out such a case as entitles them to the relief which they seek. It appears to me that both Mr. *Oswald* and Mr. *Bousfield* put their cases a great deal too high. If I understood Mr. *Oswald's* argument rightly, he contended that it was sufficient for him to shew that it was an account between trustee and *cestui que trust,* and that no vouchers had been delivered and no bills of costs had been delivered, and thereupon he was entitled to have the account opened, notwithstanding the release and settlement of accounts. In my opinion that is not the law, and I do not find in any of the cases cited by Mr. *Oswald,* or the cases which I have had an opportunity of consulting, that there is any authority for such a proposition. I conceive that you must between trustee and *cestui que trust* as well as between other persons, in order to open a settled account, shew some error in the settled account. You must shew that there is some objection in substance—that there

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is something wrong in the settled account by which injustice has been done to the persons who complain. That is the law, as I understand it, stated by Lord *Cottenham* in *Coleman* v. *Mellersh* (1), where he points out that there is this material difference in dealing with settled accounts where the parties between whom the account has been settled are in a fiduciary position and where they are not. Where they are in a fiduciary position the Court sets aside the account upon proof of some error and allows the account to be taken notwithstanding the settlement; but where the parties are not in a fiduciary position, upon proof of an error in the absence of fraud, all the Court does is to give an opportunity to surcharge and falsify. What Lord *Cottenham* says is this: "A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify, upon the supposition that one error having been proved others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, shew that the alleged settlement ought not to be considered as an act binding upon the party signing, and that it would be inequitable for the accounting party to take advantage of it, the Court is not content with enabling the party to surcharge and falsify an account which never ought to have been so settled, but directs the taking of an open account. Amongst the grounds on which the Court rests the application of this principle, none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts prove that he possessed and abused the confidence which had been reposed in him: all these appear to me to concur in the present case." And one might also refer to the case of *Williamson* v. *Barbour* (2), before the late Master of the Rolls, and *Gething* v. *Keighley* (3), for illustrations of what I conceive to be the settled rule of this Court. Therefore, I think that Mr. *Oswald* put his case too high.

But, on the other hand, I think Mr. *Bousfield* put his case too

(1) 2 Mac. & G. 309, 314.
(2) 9 Ch. D. 529.
(3) 9 Ch. D. 547.

high, because, if I understood his argument rightly, it was this, that the solicitor trustees were not the solicitors of the parties, and therefore they owed no obligation to the parties to give them information as their clients. But Mr. *Bousfield* seemed to me to overlook this, that the parties did not stand to each other in the ordinary relation of one adult person dealing with another adult person; they were in the relation of trustees and *cestuis que trust*; and whether the question is as to a bill of costs which the trustee solicitors are making, or to a sum of money whatever it may be which the trustees have in their hands and have to account for to their *cestuis que trust*, I conceive that the rules of this Court impose upon the trustees in such dealings and in such accounting the obligation of giving the fullest information and assistance. If that be so, I ought to add that in my opinion some of the questions which were so much agitated in the evidence are to my mind unimportant. I do not conceive that the mere fact of a release having been executed is of the slightest importance. I take it that a release in the eye of a Court of Equity is nothing more than a record by deed of a settled account, and, unless the settled account is unimpeachable, the fact of the parties having signed a release will not assist those who depend upon it for a defence. Therefore, the questions whether the release was executed on the Tuesday or the Thursday, whether the parties were asked beforehand to execute the release, or what was said when the release was executed, appear to me of very little importance. The material thing is the account. Can the account be opened, or ought the account to be opened?

Now, if Mr. *Oswald* had succeeded in shewing us that there was any grave or substantial error in the accounts, I myself should have been disposed to say that the learned Judge in the Court below was wrong in not giving his clients relief. The account itself contains a great many items. It is an executorship account, and, with regard to the bulk of the account, neither by the pleadings nor by his evidence has Mr. *Oswald* attempted, as it seems to me, or successfully attempted, to shew any error whatever. How does the matter stand? His clients have had the advantage of having all the documents in Messrs. *Still's*

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possession relating to this account produced to them in the course of this litigation, and I think we are entitled to assume that if those documents or the absence of documents had laid any ground for entitling Mr. *Oswald's* clients to open this account, we should have heard something from him on the subject. If he had been able to say, for example, that there were items which the documents furnished did not vouch, or of the payment of which there was no evidence, or if he had been in any way able by cross-examination of Messrs. *Still* or otherwise to impeach the account as a whole, I feel quite confident that we should have heard something about that from him. But we heard nothing of the kind; and, therefore, I think we are entitled to say that the Messrs. *Still,* quite independently of the settled account, and quite independently of the release, have established to the satisfaction of the Court the general correctness of the accounts.

Now, with regard to the bills of costs—and it is upon that, of course, that we feel most difficulty—I do not myself doubt for one moment that there was an obligation upon the trustees, at least, to inform their *cestuis que trust* that those amounts were amounts which they had deducted in payment of their own bills of costs, the particulars of which and the detailed bills of costs of which they were bound to furnish if they were required. I myself should be disposed to go further than Lord Justice *Lindley,* and to think that they ought to have incorporated with their account the actual bills of costs themselves, and that the amounts should have been entered in the general account as "£116 retained by *Still & Co.* as per bill of costs accompanying." But whether I am right in that or not, at least they were bound to tell their *cestuis que trust* that they were entitled to the details, and, moreover, that if they were not satisfied with those accounts or preferred to have the bills of costs tested in the proper way, that they were entitled before settling the account to have that done; and I cannot help expressing my opinion that it was an error, and I think a serious error, in Messrs. *Still & Sons,* who are solicitors of considerable experience, not to have taken that course, and my regret that they did not do so. But after all, what is the result of their not having taken that course?

Why, this, that when the correctness of the account is challenged they are liable to have it proved against them that they have made overcharges in their bill of costs, and that if that is proved they cannot rely upon the settled account or the release as a defence to any claim. That I think is the utmost that can be said as to their position. I quite agree that if Mr. *Oswald* had proved that the amounts charged for the bills of costs and retained by them were excessive, or, to use his own language, "extortionate," the settled account and the release would under the circumstances have been no defence whatever, and they would have been liable to have had the bills of costs taxed. But I must say that I do not think that Mr. *Oswald* has successfully made any such case. He has used over and over again the expression "extortionate charges." For myself, I do not see the evidence of it. He has referred to their costs ledger, which contains various memoranda for the purpose of making out their bills of costs; but I do not think in justice to Messrs. *Still* that we are entitled to assume that every item which is written down in the course of business from day to day in this costs ledger would necessarily appear in their bill of costs when it was made out. Still less do I think we are entitled to assume that those attendances, to which Mr. *Oswald* very properly and naturally drew attention, and which I believe could not be maintained on taxation—attendances on themselves to pay their own fees and things of that kind—are included in the sum which is charged in the account, because I observe that, taking Mr. *Oswald's* own figures, the amount which is charged in the account is at least £7 8*s.* 4*d.* less than the amount of their entries in the costs ledger, and therefore I do not think it could be fairly assumed against them that those items to which some objection might be taken on taxation would necessarily form part of a bill of costs for that £116, if one were made out, delivered, and subjected to taxation. Having regard to the lapse of time, and having regard to the circumstances under which this case is brought before us, I think Mr. *Oswald* ought to have proved that, looking at the amount of work done and looking at the amount of the estate, £116 was an excessive amount—I do not say grossly excessive, but was an excessive amount to charge for the solicitor's work of

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the executorship. If it were so, I do not see that it would have been difficult for Mr. *Oswald* to call a respectable solicitor of experience in such matters to have told the Court that it was so. Instead of that, what did he do? All he did was to put in the managing clerk of the solicitor who instructs him, and all he says is (I do not at all say he was not stating his own belief, though of course with a natural bias, for which he cannot be blamed, for the side which his employer was interested to support), "I believe I could get one-sixth off that bill," and one-sixth, as I understand him, not off the amount which is charged in the executorship account, but off an assumed bill of costs to contain all the items which are contained in the costs ledger. That is not enough; and, having regard to the very small benefit, if any, which could possibly result to these Plaintiffs if they got what Mr. *Oswald* asks us to give them, and having regard to his failure, in my opinion, to prove any error which would justify us in opening the account, I think the decree ought to be affirmed. Of course, we cannot alter Mr. Justice *Romer's* decree in regard to costs; but for myself I think I should not have been disposed to have made the Plaintiffs pay costs in the Court below.

Solicitors: *R. Chapman; Trower, Freeling, & Parkin.*

H. C. J.

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VAUGHAN WILLIAMS, J.
*Aug.* 1, 2, 3, 4, 7;
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*Nov.* 6, 7.

*Company—Winding-up—Contributory—Paid-up Shares—Statement accompanying Certificate—Companies Act,* 1862 (25 & 26 *Vict.* c. 89), s. 23—*Companies Act,* 1867 (30 & 31 *Vict.* c. 131), s. 25.

A company was formed for acquiring the business of two persons who were manufacturers of medicated food and wine. It was agreed that the purchase-money should be paid partly in cash and partly in fully paid-up ordinary shares of £1 each: and in addition to this forty fully paid-up "founders' shares" of £25 each were to be allotted to the vendors or their nominees. This agreement was never registered. The promoters of the company and the company after its incorporation entered into negotiations with various medical men to induce them to recommend to their patients and others the goods sold by the company, promising them each one of the founders' fully paid-up £25 shares. As soon as the company was incorporated the directors signed certificates for the "founders' shares" with the names in blank. These the secretary filled up and sent one to each of the medical men who had consented to accept shares. It did not appear on the certificates that the shares were paid up, but the secretary in his correspondence with the recipients told them expressly that the shares would be fully paid up and would involve no liability. The recipients acknowledged the receipt of the certificates without any condition or qualification. None of the recipients were placed on the register of shareholders, nor was any agreement with them registered. A few months afterwards the company held a meeting and passed a resolution for a voluntary winding-up: and in contemplation of the meeting the secretary wrote to all the medical men who had received the certificates of "founders' shares," asking for a return of the certificates on the ground that the shares had never been allotted. The certificates were accordingly returned. The liquidator placed the recipients of the certificates on the list of contributories; and they applied to have their names removed:—

*Held* (affirming the decision of *Vaughan Williams,* J.), that the applicants had never agreed to take any but paid-up shares, and that their names must be removed from the list of contributories.

THE company registered as *Macdonald, Sons, & Co., Limited,* was formed in the year 1892 to take over a business carried on under the name of *Macdonald, Sons, & Co.* in certain patent medicinal food and wine. By the contract of sale it was agreed that the business should be purchased for £6000, to be paid as to £1000 in cash, and as to £5000 in fully paid-up shares of £1 each. In addition to which it was provided that forty vendors' shares of

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£25 each should be allotted as fully paid-up shares to the vendors or their nominees as "founders of the company." This contract was never registered under sect. 25 of the *Companies Act*, 1867, although the directors instructed their solicitor to have this done. Prior to the incorporation of the company Mr. *Plumb*, afterwards the secretary of the company, called on certain doctors and offered each of them a fully paid-up founders' share, to which he said no liability would attach, in consideration of their recommending the goods of the company. A similar offer was also made to other doctors by Mr. *Plumb* as secretary of the company after it was incorporated. These offers were accepted by the doctors. On the 15th of July, 1892, the company was registered and a prospectus was issued bearing on the face of it the names of the doctors who had promised at that time to accept founders' shares in the company.

On the 28th of July, 1892, the directors made an allotment of shares, which did not include the founders' shares; but at the same time, or a few days afterwards, the certificates for the founders' shares were signed in blank by two of the directors. These certificates and the counterfoils in the certificate book were filled in by the secretary and were sent out by him at various dates between the 12th of September and the 8th of October, to the doctors who had consented to take them. The certificates did not on the face of them purport to be for fully paid-up shares, but stated that the allottee was the registered proprietor of "Founders' share No. —— according to the articles and memorandum of association."

The recipients in each case acknowledged the receipt of the certificates without any condition or qualification. The recipients were never entered in the register as shareholders, nor was there any formal allotment to them. On the 18th of October, 1892, the directors passed a resolution to call a meeting with a view to voluntary liquidation of the company, and on the same day the secretary wrote to the recipients of the certificates of founders' shares as follows: "The founders' share certificates having been irregularly posted to you, not having been allotted, kindly return the same to us, for your own interest, by return of post." A considerable number of the certificates were accord-

ingly returned, and the counterfoils of such as were not returned were marked by the secretary as cancelled.

On the 28th of October, 1892, the company passed a resolution for a voluntary winding-up; and on the 9th of November an order was made to wind it up compulsorily.

Under these circumstances the Official Receiver and Liquidator placed on the list of contributories the name of each of the medical gentlemen to whom certificates of the founders' shares had been sent as liable for an unpaid £25 share. Eight of these gentlemen, Messrs. *Phillips, Worley, Sworn, W. B. Richards, A. F. Richards, Cundell, Farr,* and *Hoare,* applied to have their names taken off the list.

The summons came on for hearing before Mr. Justice *Vaughan Williams* on the 1st of August, 1893.

*Warrington,* for the Applicants:—

The Applicants never agreed to take the shares, and never became shareholders in the company. There was never any formal allotment to them, and their names were not entered in any register of shareholders. The only way in which the liquidator can allege that they became liable, is by retaining the certificate sent to them; but they knew nothing of the irregularities which had occurred, and were entitled to suppose that everything had been done to make the shares fully paid up in the sense that nothing could be called up on them from the Applicants. If there was an agreement, it was only to take fully-paid shares. To make a person liable as a shareholder it must be shewn either that he is a member of the company, or has agreed to become a member of it: *Companies Act,* 1862, s. 23. He cannot be made liable on an agreement to take shares, unless he has taken the particular shares contracted for, and if he has contracted with the company to take paid-up shares, he cannot be rendered liable for unpaid shares: *Arnot's Case* (1). The same case establishes that it is the duty of the company to register, under sect. 25 of the *Companies Act,* 1867, any agreement that the shares are to be paid for otherwise than in cash.

(1) 36 Ch. D. 702.

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The entries in the counterfoils of the share certificate book are not entries in the register of members. The certificate book is kept for a totally different purpose, and cannot be said to be a register, especially when there is a register of members in which the names of the persons sought to be put on the list do not appear.

*Israel Davis*, and *James Bacon*, for the Official Receiver and Liquidator:—

The Applicants agreed to take shares in the company, that is to say, the shares referred to in the certificates sent to them. Their contract was to take them as unpaid shares, for the company could not issue them as fully paid up, even if the agreement relating to them had been filed under sect. 25 of the *Companies Act*, 1867: *In re Eddystone Marine Insurance Company* (1). The shares having been issued under circumstances in which the company would be estopped from disputing that they were well created, the Applicants, having entered into agreements as to them which became binding at any rate before any attempt was made to rescind or avoid them, are liable in respect of the shares: *Campbell's Case* (2).

In such a case persons who have retained share certificates, and acknowledged the receipt of them, are liable as shareholders: *Challis's Case* (3).

The counterfoils in the certificate book are a sufficient register of shareholders, for it is not necessary that the names should be inserted in a book actually called the "register of members": *Weikersheim's Case* (4). But sect. 23 of the *Companies Act*, 1862, is not exhaustive, and if there is an agreement to take shares it is not essential that the names should be in the register: *Portal* v. *Emmens* (5).

*Arnot's Case* (6) is really an authority against the Applicants, for if there had been acceptance in that case of the particular shares the appellant would have been held liable.

(1) [1893] 3 Ch. 9.
(2) Law Rep. 9 Ch. 1, 15.
(3) Ibid. 6 Ch. 266.
(4) Law Rep. 8 Ch. 831.
(5) 1 C. P. D. 201, 664.
(6) 36 Ch. D. 702.

*Warrington*, in reply:—

*Arnot's Case* (1) shews that the certificate book cannot be a register of members. *In re Eddystone Marine Insurance Company* (2) is quite different, for there no consideration was given for the shares; but the founders' shares in the present case were part of the consideration payable to the vendor. The certificates here were not issued; the authority of three directors was necessary to a valid issue.

[VAUGHAN WILLIAMS, J., referred to *Ex party Sandys* (3); *Sherrington's Case* (4); *In re London Celluloid Company* (5).]

In *Ex parte Sandys*, a mistake of law only had been made. The alleged contributory had also transferred some of the shares and applied for proxies, and she had been registered as a shareholder.

[VAUGHAN WILLIAMS, J.:—Those things merely amounted to evidence, that although the original contract was for fully-paid shares, the subsequent agreement was to become a member. Mrs. *Sandys* was all the time under the impression that she was on the register in respect of shares issued at a discount.]

Here there was only a receipt of the certificates, and the liquidator must shew either that the Applicants were on the register, or that they had agreed to take the shares. There was in fact no issue of shares, so that it becomes immaterial whether sect. 25 of the *Companies Act*, 1867, applies.

[VAUGHAN WILLIAMS, J., referred to *Blyth's Case* (6).]

If there was any contract it could be repudiated by the company and the Applicants: *Barnett's Case* (7).

*Davis*, in reply on the new cases cited:—

This is not a case of rectifying the register on the ground of mistake, as in *Hartley's Case* (8), and *In re Darlington Forge Company* (9). Where the alleged shareholder has known all

(1) 36 Ch. D. 702.
(2) [1893] 3 Ch. 9.
(3) 42 Ch. D. 98.
(4) 31 Ch. D. 120.
(5) 39 Ch. D. 190.
(6) 4 Ch. D. 140.
(7) Law Rep. 18 Eq. 507.
(8) Ibid. 542.
(9) 34 Ch. D. 522.

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along that the shares have not been paid for in cash, he cannot rely on the fact that the company has represented that the shares were fully paid up: *In re London Celluloid Company* (1).

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This is an application to remove the names of the several gentlemen named in the summons from the list of contributories, and the application is based in each case on substantially the same facts.

The facts are these. The company was formed for the purposes of acquiring and carrying on the business of medicated wine manufacturers, which business was agreed to be purchased by the company at the price of £6000, to be paid as to £1000 in cash, and as to £5000 by 5000 fully paid-up ordinary shares of £1 each. In addition to the above consideration, it was provided that 40 founders' shares of £25 each should be allotted as fully paid up to the persons named by the vendors as founders of the company. The company, apparently with the consent, if not by the direction of the vendors, entered into negotiations with various medical men to induce them to prescribe and recommend to their patients and tradesmen in their neighbourhood the goods dealt in by the company, promising to each doctor who undertook thus to recommend the company's wares a fully-paid founders' share. The legal result of this was, I think, that the company issued such shares under their contract with the vendors, and not by virtue of any contract between the company and the doctors. The negotiations, however, were in some instances conducted directly between the doctors and the secretary of the company, without mentioning the vendors; but in the view which I take of the case this was not of importance. The only agreement, however, which was ever attempted to be registered under sect. 25 of the *Companies Act*, 1867, was the agreement between the company and the vendors. The directors went to allotment on the 28th of July, and on that day, in addition to allotting the ordinary shares taken by the public, two of the directors—not three, as provided by the articles—signed and sealed the 40 founders' shares in blank, with no

(1) 39 Ch. D. 190.

names filled in. Prior to this, on the 5th of July, the solicitors of the company had written to the directors to remind them of the necessity of registering the contract under which fully-paid shares were to be allotted to the vendors or their nominees, in order to prevent liability attaching to such shares, and the directors had instructed their solicitor to take the proper steps for the registration of their contract; but through some mistake at *Somerset House* there was some delay in the matter, and eventually on the 10th of September, the solicitor of the company wrote asking for a cheque for £36—the amount of the stamp as fixed at *Somerset House*, and the directors sent the required cheque; but the cheque was never paid to the authorities at *Somerset House*, and the contract in fact was never registered.

In the meanwhile the secretary filled in the names of the various doctors who were willing to recommend the wares of the company and accept a founders' share, and founders' shares were sent to various doctors, including the Applicants, and the secretary seems, either at the time when the founders' shares were sent, or in some prior letter, to have informed each of the recipients that the founders' share was fully paid, and that the recipient would incur no liability by acceptance. It is sworn by the secretary of the company that these shares were posted through inadvertence by the office boy; but I am not satisfied as to the accuracy of this statement. I think that the founders' shares were sent to the doctors either by the secretary's order, because he thought the contract had at that time been registered, or because he did not recognise the importance of registration preceding issue.

The founders' shares then sent were in each case retained by the recipients. The certificates were not expressed on the face of them to be fully paid. The recipients acknowledged the receipt by letters containing no qualification or condition. There was no entry in any register of the company of the recipients as shareholders, but the names of the recipients appear on the counterfoils in the book out of which the certificates were taken. The register of the company contains the names of the ordinary shareholders only, and it is sworn by Mr. *Plumb* that this register was entered up by the month of September from

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time to time as the certificates for the ordinary shares were sent out. But I am not satisfied as to the accuracy of this statement. I have come to the conclusion, however, that there was no register upon which the names of the Applicants were entered as members. Upon the 18th of October the directors passed a resolution to call a meeting of shareholders with the view to voluntary liquidation, and on that day the secretary of the company wrote to the recipients of the founders' shares asking each of them for a return of his share-certificate, on the ground that there had been no proper allotment. [His Lordship read the letter.] The recipients in each case returned the shares. The real reason for the demand for the return of the shares was that by this time the company had a new solicitor, who had discovered that the certificates had been issued without the contract having been registered, and it was desired, if possible, to relieve the recipients of the founders' shares from liability.

The question which I have to decide is whether under the circumstances the Applicants are liable, by reason of sect. 25 of the *Companies Act*, 1867, for the cash amount of the shares held by them. I am of opinion that they are not liable. They are not liable unless they have become members of this company. Sect. 23 of the Act of 1862 defines a "member." It says not only that the subscribers of the memorandum of association shall be deemed to have agreed to become members, but that "every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." These gentlemen are not on the register of shareholders. They cannot be members unless they are or ought to be on the register. They only ought to be if they have agreed to take these shares, or have definitely taken them and dealt with them as their own. They have not agreed expressly or impliedly to take these shares, for they only agreed to take fully-paid shares, and these are not fully-paid shares. They have no express agreement whatever with the company, and the only implied agreement which would arise on their retention of certificates of shares which they were told by the company were fully-paid shares would be an agreement to take fully-paid shares. The judgment of Lord Justice

*Cotton* in *Arnot's Case* (1) shews that there is a material difference between shares that are fully paid and those on which there is a liability, even though that liability arises not from the intention of the company, or a want of readiness and willingness by the company to give effect to the agreement that the shares shall be treated as fully paid, but from the prohibition of the statute of 1867, which says that, notwithstanding the agreement, the shares shall be deemed to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the agreement that the shares shall be treated as fully paid is duly filed before the issue of the shares. It might well be argued that, as between the company and the person to whom the shares are issued, the shares are fully paid, and that, the company having done all that is necessary on their part by delivering shares which they agree shall be treated as fully paid, a concluded agreement of membership arises the moment the shares are accepted and retained. This is the conclusion at which I should have arrived, independently of authority, and seems to have been the view of Lord Justice *James* in *Blyth's Case* (2), when he said that, "as between *Noyes*"—the allottee from whom *Blyth* purchased—"and the company the shares were at that time paid-up shares within the meaning of the articles, but the contract was not registered according to the provisions of the *Companies Act*, 1867, s. 25," and therefore *Blyth* was liable as the holder of unpaid shares. And the same view seems to have been taken by Vice-Chancellor *Hall* in *Pagin & Gill's Case* (3). But in *Arnot's Case* (4) Lord Justice *Cotton* says: "What the contract requires is that the shares should be considered as paid up, that is shares in respect of which no call could be made upon the holder."—The Lord Justice was speaking of a contract like the present between the vendor and the company for the issuing fully-paid shares—"Although these were shares in the company, there is, in my opinion, a material difference between shares in respect of which there is no liability, and shares in respect of which there is liability to the full amount. In the one case the proposed shareholder is to have the benefit of the

(1) 36 Ch. D. 702.
(2) 4 Ch. D. 140, 141.
(3) 6 Ch. D. 681.
(4) 36 Ch. D. 708.

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shares for a consideration, and in the other he is to be treated in the same way as any other shareholder. This is not a contract subject to the same considerations as any other contract with the company, but it is a contract between Captain *Arnot* and the company that he shall accept and that they shall give that which is in point of fact to be considered as paid-up shares. It is said that the company have done their part, and that it was intended that when Captain *Arnot* agreed to take these shares as paid-up shares, it was to be by registering the contract under which they were to be issued as paid up. In my opinion sect. 25 of the Act of 1867 does not throw upon any particular party to the contract the obligation of registering the contract under which the shares are to be issued, or require that the contract is to be registered before the shares can be considered as paid-up shares. It is for those who seek to enforce a contract to take shares, to put themselves in a position to be able to complete their contract, that is to say, it is for the company effectually to perform that part of the contract which is necessary in order to make these shares fully paid-up shares." The result seems to be that no contract to take shares, other than fully-paid shares which will be so considered in law, can arise from the retention of shares which the company represented as fully paid at the time of the delivery and retention of the certificates.

The remaining ground on which it is possible that these doctors may be held to be members is, if they deliberately took these shares and dealt with them as their own, to say that the agreement no longer rests *in fieri*, that there is a concluded agreement to take these shares, and that as the shares have been taken by accepting the certificates, no question of specific performance arises, and that the case is like that of the lady in *Ex parte Sandys* (1), who, having contracted to take shares at a discount, was held liable for the full amount when it was, after some years, discovered that it was not competent to issue shares at a discount, on the ground that she had definitely accepted the shares, and that, in the absence of a registered agreement she was, by virtue of sect. 25 of the Act of 1867, liable to pay in cash the full amount of the shares; or like *Arnot's Case* (2), as it

(1) 42 Ch. D. 98. (2) 36 Ch. D. 702.

seemed to be before the further evidence was given in the Court of Appeal, and when Captain *Arnot* was fixed, in the Court below, with shares other than fully-paid shares, although his contract was for fully-paid shares, because he was supposed to have dealt with the shares by transferring them. In these cases, the person who has assumed to deal with the shares as his own, either by giving an authority to put his name on the register as owner, or by acquiescing in the name being there when once placed there, or by giving authority to sell them as owner, is conclusively proved by his own conduct to be a member, and cannot rely on a deviation from the original contract as a ground for relief from membership, and, being a member, cannot deny that the shares were issued to him; and the shares having been issued to him, he must pay the full amount thereof, unless he can shew that the contract relieving him from liability to pay has been duly filed in accordance with sect. 25 of the Act of 1867.

In the present case there seems no pretence for saying that the Applicants authorized their names to be put on the register, or entered into any contract which irrevocably authorized their names to be put on the register in respect of any shares which could not in law be treated as fully paid up. If, therefore, they are to be treated as members, it must be because they have assumed dominion over the shares; but can it be said that they did so by receiving or retaining certificates which they were told related to fully-paid shares, whereas the shares really were shares which could not be treated as fully paid up? The question is, did they treat the shares as their own? I do not think they did so, as they believed in the statements of the company that they were dealing with something materially different.

It is to be observed that there was no publicity in the retention of the shares. It was not followed by their names being put on the register, nor by the publication of any list containing their names as shareholders. This is not a case in which, while the names of the Applicants were on the register, the rights of creditors intervened by a liquidation occurring. It is not a case in which the Applicants would have been required before the liquidation to take any steps to get their names removed from the register.

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Moreover, it is a case in which, according to *Hartley's Case* (1), the Court would have rectified the register by allowing the names to be removed and replaced after the contract had been duly filed in pursuance of sect. 25 of the Act of 1867 if the application had been made before the liquidation, and it seems impossible to say that the names of these persons ought to be on the register because they accepted certificates, seeing that, if they had received the certificates, and their names had been on the share register, the Applicants would have been entitled to have the register rectified and their names removed. There is another way in which the case can be put in favour of the Applicants, which is this: There was originally no contract between them and the company. The contract was between the company and the vendors, under which forty fully-paid founders' shares were to be allotted to the vendors or their nominees as part of the price payable to them by the company on the sale by them of the property which the company purchased. Each of the Applicants received as a nominee of the vendors a founders' share for £25, accompanied by a letter stating that the share sent was fully paid. The position of such nominees, it is said, in *Carling's Case* (2) and *De Ruvigne's Case* (3), does not differ from that of transferees from the vendor, and, if so, the case in the House of Lords of *Burkinshaw* v. *Nicolls* (4) seems to shew that the covering letter is by estoppel evidence against the company that the amount of the founders' share has been paid in cash; and it would seem to follow that the recipients of the certificates cannot, by reason merely of the retention of the certificates, be treated as the holders of shares on which they are liable to pay anything. It would seem from *De Ruvigne's Case* that they are not in the same position as if the shares had been issued to them, for it would seem that the shares must be treated as having been issued to the vendor, although no letter of allotment or certificate was sent to him, and no notice of the vendor as the holder of these shares appears in the books of the company. The persons whom it was sought to hold liable had taken shares as nominees of the vendor to the company,

(1) Law Rep. 10 Ch. 157.
(2) 1 Ch. D. 115.
(3) 5 Ch. D. 306.
(4) 3 App. Cas. 1004, 1016.

and Lord Justice *James* says in *Carling's Case* (1): "The mode in which the Master of the Rolls has fixed these gentlemen is by treating as unpaid shares the shares for which they are entered in the register as holders of paid-up shares. Now, beyond all question they never made themselves liable to take any shares at all—they never contracted to take shares or to pay for shares—the only contract between them and the company was the contract that arises from the fact that certificates of the shares as paid-up shares were sent to them and they accepted those certificates. If, therefore, the case depends on a contract between them and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid-up shares, we cannot convert that into a contract to take unpaid shares. These shares formed part of the shares which had been agreed to be given to Mr. *Walker* in part payment of his purchase-money, and I think that the case cannot be distinguished in point of legal result from what it would have been if the shares had been formally registered in the name of *Walker*, and then transferred by *Walker* to the directors in pursuance of his agreement with them. If that had been done in form, which was the substance of the transaction, it appears to me that it would have been impossible to treat the shares in the hands of *Walker's* transferees otherwise than as paid-up shares which *Walker* had got from the company, and which had been transferred from *Walker* to the directors"—who were the persons sought to be made liable.

I hold, therefore, that the Applicants are not liable (1.) because they never agreed to become members of the company except in respect of fully-paid shares; (2.) because, in the absence of a contract, they can only be liable by taking and dealing with the shares as their own; and I hold that merely taking and retaining the certificates does not amount to that.

These are the grounds on which I decide the case; but I have pointed out that it is at least arguable that the Applicants are also entitled to be relieved from liability because they had no contract with the company, but were merely nominees of the vendors, in which case, according to Lord Justice *James*, they are

(1) 1 Ch. D. 115, 124.

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in the position of transferees from the vendors. If so, they are entitled to the benefit of the decision in *Burkinshaw* v. *Nicolls* (1), that though, as between the company and the persons to whom it contracted to issue shares, the shares are unpaid; yet, so far as third persons are concerned who had not notice that the shares were not fully paid up, the effect of the company having sent the certificates with a covering letter stating that the shares were fully paid is the same as if the words "fully paid" had been printed on the certificates themselves, and this is evidence by estoppel as between the company and such third persons of full payment of the shares having been made. In such a case the Applicants would not be liable to be put upon the register—not because they are not shareholders, but because as between them and the company it is shewn that the shares were issued as fully paid up to the vendor.

I do not intend by anything I have said to decide the question whether the vendors themselves are liable to be placed on the list in respect of the shares issued to them.

I cannot leave this case without making one observation on the facts. It is, to say the least of it, a very sad thing that members of a learned profession should have condescended to accept these fully-paid shares on these terms. It may be that each individual doctor thought well of the wares of this company, and that in prescribing or recommending the wares of this company he acted according to his conscience; but it is not the less the fact that the shares were taken by these doctors as bribes. For my own part, a great part of the difficulty that I have had in dealing with this case—and I have had difficulty in dealing with it—has arisen from a strong feeling that if these doctors were put upon the list of contributories it would serve them right. But it is not my duty by my judgment to arrive at a conclusion of law contrary to what I believe the principles of law to be, merely because I disapprove of the conduct of the litigant. I have only to administer the law as I believe it to exist, and I have done so.

F. E.

C. A.

From this judgment the liquidator appealed. The appeal came on to be heard on the 6th of November, 1893.

(1) 3 App. Cas. 1004, 1016.

*Cozens-Hardy*, Q.C., *Israel Davis*, and *James Bacon*, for the Appellant, relied on the same arguments as in the Court below.

[They cited *Ex parte Sandys* (1), and distinguished the present case from *Arnot's Case* (2).]

*Warrington*, for the Respondents, referred to *Barnett's Case* (3).

*J. Bacon*, in reply.

LINDLEY, L.J.:—

This is an appeal, on the part of the liquidator, against an order of Mr. Justice *Vaughan Williams*, deciding that certain gentlemen, to whom I shall have occasion to allude, are not contributories in the winding-up of this company. I do not propose, myself, to say anything about the morality or immorality of the conduct disclosed in this case. What has come to light is a matter for the medical council, not for us, to consider. But, much as we may disapprove of this method of puffing the company, we cannot allow ourselves to invent a contract for the sake of putting these gentlemen on the list of contributories, if contract there is none; and we cannot allow ourselves to twist the facts or to draw inferences which ordinary reasonable men cannot reasonably find or draw. The question is, whether these gentlemen are contributories to this company? That depends on the meaning of the word "contributory" in sect. 74 of the *Companies Act* of 1862. To get at that meaning we must refer back to the definition of members in sect. 23, and if we look at that section only we find that nobody is a contributory unless he is a member; but that is qualified by other sections, because in settling the contributories the Court has power to rectify the register, and to place on the register the names of persons who ought to be there. Two questions arise: Is the alleged contributory a member? If so, he is as a rule a contributory. If not a member, has he agreed to accept shares? If he has, the Court can order the register to be rectified by putting his name on. Are these gentlemen members according

(1) 42 Ch. D. 98, 116, 117. (2) 36 Ch. D. 702.
(3) Law Rep. 18 Eq. 507.

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to the definition in sect. 23? Clearly and plainly they are not. In order to be members they must be registered as shareholders, and they are not. Then can they be regarded as members by estoppel? Now, they are certainly not estopped by any plea put forward by themselves. If estopped it must be by conduct of their own, by which they had represented themselves to be members, so as to induce people to act on the faith that they were members. But there is no evidence of anything of the kind. The evidence against them, such as it is, is this: that the company having been registered in July, 1892, certain certificates which had been originally signed and sealed without the names of any persons being inserted in them, had the names of friends of the promoters inserted, and were distributed to them. The certificates are in the form which is before me. [His Lordship read the certificate.] Well now, what did they do? With the certificate, or before it was sent, was sent a letter to the effect that the share represented by that certificate was a fully paid-up share. The persons who receive these certificates keep them for some time. They are sent out on some days between the 12th of September and the 8th of October, 1892, and they are kept by the persons to whom they are sent. Now, these persons keeping these certificates, what is the inference to be drawn? Is it that they are accepting a share on which there is a liability, or that they keep this bit of paper upon the supposition that it represents a share upon which there is no liability? The facts answer for themselves. It is quite obvious that they did not keep those certificates as representing shares upon which they were liable. Quite the reverse. On the 18th of October, the company being in difficulties, the directors came to the conclusion that it was desirable to take steps to wind it up voluntarily, and on the same day the secretary sent a letter to each of the persons who had received these documents asking him to send the certificate in, because there had been some mistake in the allotment; and they were all sent back. What is the inference? Is it that these gentlemen had accepted something different from that which they had ever intended to accept? The answer is, No. I do not say that there is no evidence of it, but to lay that evidence before a jury, and to ask them to say that these gentlemen

accepted something different from anything which they had ever agreed to take, would be to ask them to do violence to their own common sense. They are not members: they are not estopped. It is possible that between the interval of the issuing of these certificates and the 18th of October, the secretary may have been authorized to put them on the register; and if they had been put on, and had remained there, there would have been strong evidence to shew that they had accepted the shares. But nothing of the sort was done, and after the 18th of October it would have been idle to do so. They are neither members, nor have they agreed to become members. I do not think I am putting it too strongly in saying that there is no agreement. I think there is no agreement at all, but I am perfectly convinced that there is no agreement which can be enforced, and that there are no grounds whatever for putting these gentlemen on the list. I think the decision was quite right, and the appeal must be dismissed.

A. L. SMITH, L.J.:—

I am of the same opinion, and have but little to add. There is no evidence upon which any reasonable man would infer that these gentlemen are liable; and I also think that there are no circumstances upon which it can be inferred that these gentlemen could be fixed as contributories. For these reasons, I think that the judgment of Mr. Justice *Vaughan Williams* is quite right.

DAVEY, L.J.:—

This is an application by a number of gentlemen who are not on the register of the company, to be taken off the list of contributories, upon which they have been placed by the liquidator in respect to certain founders' shares. The only question, therefore, is whether the liquidator can make out that there was existing at the date of the winding-up an enforcible contract in pursuance of which the liquidator would have been entitled to call upon the Court to rectify the register. I conceive that in order to put a person who is not on the register on the list of contributories, you must shew that there are circumstances sufficient to entitle the liquidator to put him on the register.

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These gentlemen never applied for shares. Most of them had the offer from the vendors or promoters of the company before the company was formed, and two or three were invited to take these shares after the formation of the company. Dr. *A. F. Richards* was one who was offered a share before the formation of the company. Mr. *Plumb* wrote to him as follows:—"We are issuing to fifty doctors, who will be founders, a £20 fully paid-up share each, no liability attaching to same whatever. Your brother, Dr. *Blagdon Richards*, is a founder and mentions your name to us as one who might consent to become one too. We shall be glad to put your name on our list of founders, and trust you will consent to be one. Dr. *Richards* has consented to become a founder, after having seen samples and reports. We shall be sending samples to you later on." Dr. *Richards* replied, after asking for samples: "I shall be pleased to become a founder and to accept your kind offer of a £20 share, provided that no liability whatever attaches to it, and that no use inconsistent with professional dignity and respect be made of my name should they be satisfactory." Then, after the registration of the company, Dr. *Cundell* is offered a share in these terms: "We have two or three founders' shares unplaced. They are fully paid up, and of the value of £25 each, no liability attaching." To which he replies: "In respect to your offering me a founders' share free from all liability, I beg to say I will accept with pleasure." Clearly, therefore, whatever agreement was existing at that time, it was merely to take a share to which no liability whatever attached. The counsel for the Appellant argued that these gentlemen had gone beyond the stage of contract to take a share, and had each accepted a definite share appropriated to him. It appears to me that it may be conceded, for the purpose of argument, that the acceptance of the certificate was so far an appropriation of the share mentioned in it as to create an implied contract to take that particular share, but only assuming it to be fully paid up. And assuming that what took place was an authority to put the several doctors on the register, that authority, if it existed, was only subject to the shares being properly treated as fully paid up. If the secretary had placed their names upon the register

before the date of the winding-up, it would, perhaps, have been difficult for them to escape liability; but the shares were never registered in their names, and they never seem to have done anything as shareholders, and the transaction was, therefore, never a completed transaction. It was, in my opinion, competent for the Applicants to revoke the authority to place their names on the register on discovering that the shares were not entitled to be treated as fully paid up. And if the company or the voluntary liquidator had attempted, before the order for compulsory winding-up, to enforce the contract to take these shares with a liability to pay for the same in cash, I think neither the company nor the liquidator would have succeeded, on the short grounds that the Applicants made no such contract and gave no such authority. It is not necessary to rely upon what happened afterwards; but, in my opinion, the requests by the secretary to have the certificates returned, followed by the return of the certificates, put an end to whatever contract ought to be implied as regards the shares mentioned in the certificates. I think Mr. *Warrington* was justified in saying that the secretary's letter of the 18th of October was not untrue, although it did not state fully the reasons why the secretary desired the certificates to be returned. The Applicants returned the certificates, and thereupon it appears to me that any authority which might otherwise be implied to place their names on the register came to an end. I am, therefore, of opinion on these grounds that the appeal ought to be dismissed. In short, it comes to nothing more than this, that there was no enforcible contract in pursuance of which the Court should rectify the register, and no existing authority to place their names on the register, and the appeal must therefore be dismissed with costs.

Solicitors: *Oldfield, Bartram, & Oldfield; Halses, Trustram, & Co.*

M. W.

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# BRITISH LINEN COMPANY *v.* SOUTH AMERICAN AND MEXICAN COMPANY.

[1893 B. 3558.]

*Company—Winding-up—Debenture-holders' Action—Receiver—Appointment of Official Receiver to be Receiver for Debenture-holders.*

An order to wind up a company was made, and on the same day a receiver was appointed in an action by debenture-holders. The estimated value of the assets was sufficient to cover the debentures, leaving only a small margin. The Official Receiver applied to have the receiver discharged and to have himself appointed receiver. *Vaughan Williams*, J., held that when both a receiver's action and a winding-up by the Court were pending, the Court would, in the absence of special circumstances, appoint the Official Receiver or liquidator to be receiver in order to avoid unnecessary expense and the possibility of conflict. His Lordship, therefore, discharged the receiver and appointed the Official Receiver to be receiver, he undertaking to keep a separate account on behalf of the debenture-holders. The debenture-holders appealed, and adduced fresh evidence which satisfied the Court that a considerable part of the assets consisted of securities which could not be realized in the ordinary way of business, but could only be advantageously got in by a commercial liquidator:—

*Held*, that, *Vaughan Williams*, J., had proceeded on correct principles, but that, having regard to the special nature of the above securities, the receiver approved by the debenture-holders ought to be appointed to get them in, the Official Receiver being appointed receiver of all the other assets.

THE *South American and Mexican Company* was incorporated on the 9th of June, 1890, with a nominal capital of £3,000,000 in £10 shares. The whole of the shares were allotted and £3 per share paid up.

The company issued debentures of several classes to a very large amount. The *British Linen Company* were the holders of the first debenture, which charged the uncalled capital of the company and some specified securities with £400,000. The second class charged the uncalled capital and the undertaking with sums amounting together to £400,000, subject as regarded the property charged by the first debenture to that debenture. The *British Linen Company* also held half the debentures of the

second class, but only as collateral security. There were three other classes which were postponed to the above.

On the 24th of July, 1893, a creditors' petition for the winding up of the company was presented.

On the 26th of July, 1893, the *British Linen Company* commenced an action, as holders of the first debenture and also on behalf of themselves and all other the holders of second-class debentures, against the *South American and Mexican Company* and another company, which was trustee of a deed of trust for the benefit of the second class of debenture-holders, to enforce their securities and to have a receiver appointed. Power to appoint a receiver was given by the trust deed.

On the 2nd of August, 1893, a winding-up order was made.

On the same 2nd of August, 1893, an order was made in the action directing that Mr. *Touch* should be appointed receiver and manager on behalf of the Plaintiffs and all other persons holders of debentures of the second class, of the undertaking and all the property, assets, and effects whatsoever and wheresoever of the company which were subject to the debentures vested in the Plaintiffs, and also to manage and work the business of the company until the Plaintiffs' first debenture was paid off, and thereafter that Mr. *Touch* and Mr. *Lock* should be appointed joint receivers and managers.

The debentures were in many cases issued only as security for sums much less than their nominal amount. At the time of the winding-up order the total amount due on them was £535,339 13*s.* 4*d.*, and the estimated value of the assets exceeded that sum by about £20,000. There were unsecured creditors to the amount of about £200,000.

The Official Receiver, who was provisional liquidator, gave notice of motion in the action that Mr. *Touch* might be discharged from being receiver and manager, and that Mr. *Barnes*, the Official Receiver, might be appointed receiver and manager on behalf of the Plaintiffs as holders of the first debenture, and also on behalf of the Plaintiffs and all other persons entitled to second-class debentures.

The motion came on for hearing before Mr. Justice *Vaughan Williams* on the 24th of October, 1893.

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*Everitt*, Q.C., and *Howard Wright*, in support of the application:—

The debenture-holders are fully secured, and there will be a surplus after they have been fully paid. They are, therefore, not the only persons interested in realizing the assets. There is ample jurisdiction to dispense with the present receiver, and to appoint the liquidator to represent the interests of both the secured and the unsecured creditors. The question really is, in which way will the assets be most cheaply and expeditiously realized? Great inconvenience will result from allowing the receiver nominated by the debenture-holders to get in the calls, and there will be great inconvenience in having two officials engaged at the same time in realizing the assets. Here a large amount of calls has to be collected; whereas, in *In re Joshua Stubbs, Limited* (1), where the Court refused to displace a receiver by a liquidator, the only capital remaining uncalled was about £180, and that was the real ground of the decision. In *Strong* v. *Carlyle Press* (2), on which the Respondents will rely, there was no uncalled capital, and the debenture-holders were the only persons interested in realizing the assets.

*Moulton*, Q.C., and *E. J. Elgood*, for the Plaintiffs:—

The position of a receiver, according to winding-up practice and the general practice of the Court, is that of a person acting for mortgagees, whose interest should remain untouched. The receiver in the present case was appointed on account of his particular knowledge of the financial affairs of the company. The debenture-holders might themselves have appointed a receiver.

[VAUGHAN WILLIAMS, J.:—But they did not, and, a receiver having been appointed, my powers appear to be different.]

The power of the Court is not disputed; but the Court must consider how it can best give effect to the rights of the parties.

[VAUGHAN WILLIAMS, J.:—I agree that the Court cannot interfere with your contractual rights; but if you come to it for assistance, other questions may arise.]

(1) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475. (2) [1893] 1 Ch. 268.

The Plaintiffs are not coming now for the Court's assistance, for their nominee has been already appointed; the Official Receiver is asking for the assistance of the Court. A mortgagee, notwithstanding the winding-up, is entitled to proceed with his remedies: *In re David Lloyd and Co.* (1).

Where, after a winding-up order, debenture-holders appointed a receiver under powers vested in them by the debentures, the Court gave leave to the receiver to take possession of the company's property: *In re Henry Pound, Son, & Hutchins* (2). In *In re Joshua Stubbs, Limited* (3), it was unnecessary to hear both sides, and therefore the fact that only a small amount of calls has to be collected cannot be regarded as the only ground which exists for refusing to displace a receiver by the Official Receiver or liquidator. The misapplication by the Applicants of *In re Joshua Stubbs, Limited,* is corrected by *Strong* v. *Carlyle Press* (4).

[VAUGHAN WILLIAMS, J.:—In that case the matter came before me in Chambers, and I thought I had the power to appoint the Official Receiver as receiver; but, as far as I remember, no cases were cited to me, and I certainly did not intend to decide any question of principle. No opportunity was given to me of re-hearing the case in Court; and the case went to the Court of Appeal without any certificate from me.]

The principle of *Strong* v. *Carlyle Press* is that mortgagees are to be treated as persons outside the liquidation, and that, when they have properly obtained the appointment of a receiver of the mortgaged assets, such receiver ought not to be disturbed.

[VAUGHAN WILLIAMS, J.:—Do you say that when a winding-up order has been made, the mortgagees have still the same right?]

Yes.

[VAUGHAN WILLIAMS, J.:—But neither in *In re Joshua Stubbs, Limited,* nor in *Perry* v. *Oriental Hotels Company* (5), was that the view of the Court. The general words used by the Court in *Strong* v. *Carlyle Press* were, I think, directed to the particular case

(1) 6 Ch. D. 339.
(2) 42 Ch. D. 402.
(3) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475.
(4) [1893] 1 Ch. 268.
(5) Law Rep. 5 Ch. 420.

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before it. The principle of *Perry* v. *Oriental Hotels Company* (1) was affirmed in *In re Joshua Stubbs, Limited* (2). Instead of saying that debenture-holders are "outside the liquidation," you should say that the Court will not allow their rights to be prejudiced by the liquidation. There are cases where the *primâ facie* rights of the debenture-holders may be interfered with by the Court.]

There is no sufficient ground for doing so in the present case. It is suggested in support of the application that the debenture-holders are fully secured; but the valuation of the assets shews a margin which is not nearly so large as that which investors require even in quiet times.

The Official Receiver has many duties to perform, and cannot give the personal attention required to properly realize assets like these. The securities are not ordinary *Stock Exchange* securities.

The mortgagees have a right to have the realization of their own property in their own hands; and there is no general rule that a debenture-holders' receiver is to be displaced in favour of the liquidator: *Bartlett* v. *Northumberland Avenue Hotel Company* (3).

It is said that the liquidator can get in the calls more cheaply; but there is no evidence that proceedings by the receiver to recover calls would cost more than those which would have to be taken by the liquidator.

[VAUGHAN WILLIAMS, J.:—If I thought it right to continue the present receiver, I should make the liquidator give him every assistance in getting in the calls.]

*Everitt*, in reply:—

The receiver was displaced in favour of the liquidator in *Tottenham* v. *Swansea Zinc Ore Company* (4). In *Strong* v. *Carlyle Press* (5) thousands of pounds of deficiency were admitted; whereas in the present case there is, *primâ facie*, a substantial surplus. In *In re Henry Pound, Son, & Hutchins* (6) the mortgagees had appointed

(1) Law Rep. 5 Ch. 420.
(2) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475.
(3) 53 L. T. (N.S.) 611.
(4) W. N. (1884) 54; 32 W. R. 716.
(5) [1893] 1 Ch. 268.
(6) 42 Ch. D. 402.

their own receiver under powers contained in their debentures, and did not come to the Court to assist them by appointing a receiver, but only to give effect to what they had done.

VAUGHAN WILLIAMS, J.:—

I have arrived at the conclusion that in this case I ought to grant what is asked for by the notice of motion, in so far as it asks for the discharge of the order appointing the receiver and manager, and the appointment of the Official Receiver to be the receiver and manager in this action. The order which I shall make will be made upon the terms of the undertaking offered in the notice of motion—to keep a separate account—being given.

I have had my attention called to all the authorities, and I am not at all sure that the rule of practice laid down by them has been quite uniform; but, after all, it is merely a rule of practice. There are, however, some matters as to which the decisions seem to be absolutely uniform, and I will mention what they are. In the first place, it seems to me to be established by the authorities, that one ought not, by reason of the liquidation, in any way to interfere with the rights of the debenture-holders or mortgagees more than is essential in order to do complete justice to all parties interested. *Primâ facie*, therefore, when the debenture-holders or mortgagees come and ask the Court to do that which the Court has generally been accustomed to do for them—that is, to appoint a receiver, or receiver and manager—the Court, in deciding who shall be appointed to perform these duties, ought not to interfere with the rights of the debenture-holders or mortgagees more than is necessary for the purpose of the administration. In that sense, I agree with what Mr. *Moulton* contended for, that *primâ facie* the debenture-holders or mortgagees have a right to ask the Court to appoint their nominee as receiver, or receiver and manager. But then it seems to have been decided as early as *Perry* v. *Oriental Hotels Company* (1), by Lord Justice *Giffard*, that the consequence of a liquidation is, that there will be duties to be performed by the liquidator and by the receiver which will be identical, and, therefore, that if nothing more appears, the Court will generally appoint the

(1) Law Rep. 5 Ch. 420.

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liquidator to be the person to perform those duties; the reason being that, if both the liquidator and the receiver appointed in the interest of the debenture-holders were continued, there would be double expense and a great deal of unnecessary conflict; whereas, *primâ facie*, it may be supposed that the liquidator, as the officer of the Court, will be able, and will, in fact, render equal justice between the parties, and do everything that is necessary as well for the protection of the debenture-holders as for the protection of the unsecured creditors.

That rule I understand Lord Justice *Lindley* to affirm to be a rule still in existence. He deals with the matter first in *In re Joshua Stubbs, Limited* (1), at page 479 of the report, and he says this: "As the case was opened by Mr. *Renshaw* and Mr. *Ashton Cross* on behalf of the liquidator, it assumed this position—that the Court was really employing two officers to realize the same property, namely, Mr. *Fisher* as receiver for the debenture-holders, and Mr. *Hill* as official liquidator in the winding-up. If there had been nothing more in the case than that, I should have been prepared to say that it was not covered either by *In re David Lloyd and Co.* (2) or by *In re Henry Pound, Son, & Hutchins* (3), and that it fell within the other line of authorities beginning with *Perry* v. *Oriental Hotels Company* (4), and ending with *Tottenham* v. *Swansea Zinc Ore Company* (5)." It seems to me that Lord Justice *Lindley* in that passage does affirm the authority of the cases of *Perry* v. *Oriental Hotels Company* and *Tottenham* v. *Swansea Zinc Ore Company*, and in my judgment those cases do lay down the rule that, if all that you have got is a debenture-holder's action and a liquidation, in such a case, at all events if the liquidation is a compulsory liquidation, the Court will, if nothing else appears, appoint the liquidator as receiver in order to avoid two officers being employed by the Court to realize the same. And at a later page of the same report (6) Lord Justice *Lindley* says: "I do not think the observations of Lord Justice *Giffard* in *Perry* v. *Oriental Hotels Company* are in any way touched by the later authorities; and therefore, in my opinion, the Court

(1) [1891] 1 Ch. 475.
(2) 6 Ch. D. 339.
(3) 42 Ch. D. 402.
(4) Law Rep. 5 Ch. 420.
(5) 32 W. R. 716.
(6) [1891] 1 Ch. 481.

would under ordinary circumstances, as I have intimated, be disposed to accede to such an application as this. But in this case, there is this curious circumstance that makes the application of the rule unnecessary here—that there is practically nothing for the liquidator to do; that is to say, he has only to get in a sum of £180 from the shareholders." I agree with Mr. *Everitt* that in that judgment the Lord Justice not only affirms the authority of the cases to which he refers, but goes further, and treats the case of *Perry* v. *Oriental Hotels Company* (1) as laying down a rule—that if nothing else appears, the inconvenience of having two officers appointed to perform the same duty will make the Court appoint one only, who, *primâ facie*, will be the liquidator or official receiver, as the case may be.

It is said that *In re Joshua Stubbs, Limited* (2), has been in some way qualified by the Court of Appeal in *Strong* v. *Carlyle Press* (3). Now I agree with Mr. *Moulton* that there are observations of the Lord Justices in that case which, if pressed to an extreme, would seem somewhat to qualify the rule supposed to be laid down in *Perry* v. *Oriental Hotels Company*—but I do not think they meant in the slightest degree to qualify what was said in that case; they do not in any way say that they intend to qualify it. The case of *In re Joshua Stubbs, Limited*, was cited to them, and it was discussed; but I do not see anything in their judgments which qualifies what was there laid down. On the contrary, I find that Lord Justice *Kay*, in delivering his judgment in *Strong* v. *Carlyle Press* (4), says: "I think we must follow the course this Court took in the case of *In re Henry Pound, Son, & Hutchins* (5)"—I do not quite know what the Lord Justice means by that observation, because in *In re Henry Pound, Son, & Hutchins*, if I remember rightly, there was no debenture-holder's action at all—"and the observations made in the later case of *In re Joshua Stubbs, Limited*."

That seems to me conclusive that Lord Justice *Kay*, at all events, did not intend in any way to qualify the decisions and observations in *In re Joshua Stubbs, Limited*. Moreover, in

(1) Law Rep. 5 Ch. 420.
(2) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475.
(3) [1893] 1 Ch. 268.
(4) Ibid. 276.
(5) 42 Ch. D. 402.

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reading the judgments in *Strong* v. *Carlyle Press* (1), one should bear in mind what it was that the Court was dealing with. While sitting in Chambers I had, for reasons which seemed sufficient to me, but which apparently were not brought before the Court of Appeal, discharged an order appointing a receiver. The Court of Appeal conceived that the basis of my decision was a supposition on my part that there was some general rule which entitled me, merely for the purpose of saving expense, to disregard the rights of the debenture-holders or mortgagees. Bearing that in mind, just let us see what it is that Lord Justice *Lindley* says. At page 274 of the report of *Strong* v. *Carlyle Press* he says: "The learned Judge who is entrusted with the winding-up is quite right in endeavouring to keep down expenses, and I thoroughly appreciate his view, which is, 'We do not want two people to wind up this company and to apply the assets in payment of the creditors.' That is quite true; but who under those circumstances is the person to do it? Surely it is the receiver of the mortgagees, unless there is some sufficient reason to the contrary." Then, at page 276, Lord Justice *Kay*, in delivering his judgment, says: "We must treat the mortgagees as being persons entirely outside the winding-up. They have rights with which the winding-up ought not to be allowed to interfere, and, having properly obtained the appointment of a receiver, it is impossible to allow that receiver to be displaced and the liquidator in the winding-up to be put in his place. One of the reasons mentioned in the case of *In re Joshua Stubbs, Limited* (2), applies especially here. If these assets are put in the possession of the liquidator, there will be some costs incurred in the winding-up with which the mortgagees have nothing on earth to do; and the liquidator then will try, and I suppose *primâ facie* will have a right, to retain those costs out of the assets which belong entirely to the mortgagees."

I think that in all these observations the Lords Justices were dealing with the particular case which they had before them. That was a case in which the assets, admittedly, were insufficient, and insufficient by a substantial amount, to cover the debts due to the debenture-holders, and under those circumstances the

(1) [1893] 1 Ch. 268. (2) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475.

Court of Appeal only says that, the mortgagees being the only persons interested, *primâ facie* they have the right to administer and realize the property which is the subject-matter of their mortgage, and that in the absence of any reason to the contrary that is a right to which effect should be given. But I do not gather that the Court in any way intended to depart from the rule laid down by Lord Justice *Giffard* in *Perry* v. *Oriental Hotels Company* (1), and recognised in terms as the existing rule by Lord Justice *Lindley* in *In re Joshua Stubbs, Limited* (2). I may observe that this principle seems to have been acted on in several decided cases, but I will content myself with merely mentioning the names of two of them. One is *Tottenham* v. *Swansea Zinc Ore Company* (3), a decision of Mr. Justice *Pearson*, in which he points out that in *Perry* v. *Oriental Hotels Company*, before Lord Justice *Giffard*, a receiver had been appointed in the action, but that "the Court of Appeal displaced him, and appointed the liquidator receiver in his place, on the ground that the appointment of another would cause great and unnecessary expense." And in *Bartlett* v. *Northumberland Avenue Hotel Company* (4), in which Mr. Justice *Chitty* had removed the plaintiffs from being receivers in the debenture-holders' action, and appointed the liquidators of the company to be receivers in their place, on the ground that the liquidators could collect the outstanding calls more expeditiously and less expensively than the plaintiffs, the Court of Appeal affirmed his decision. Lord Justice *Cotton* in his judgment says: "The only question which we have now to consider is, whether the plaintiffs ought to be discharged from being receivers. I do not intend to lay down a general rule that a person who has been appointed a receiver is to be displaced in favour of the liquidator—there is no such rule." But still he says that he will not interfere with the decision of Mr. Justice *Chitty*. In that particular case the order appointing the receivers in the debenture-holders' action was made on the 1st of August, 1884; it was not until the 23rd of October, 1884, that the company passed a resolution for voluntary winding-up, and the order for continuing the

(1) Law Rep. 5 Ch. 420.
(2) [1891] 1 Ch. 475.
(3) 32 W. R. 716, 717.
(4) 53 L. T. (N.S.) 611, 612.

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voluntary liquidation under supervision was not made until the 15th of November, 1884. I do not understand that Lord Justice *Cotton* means to say that that was not the rule laid down by Lord Justice *Giffard* in *Perry* v. *Oriental Hotels Company* (1). What he says is that it is not such a rule as requires the Court to displace a receiver who has been appointed in a debenture-holders' action. In the present case no such question arises, because here, as in *Tottenham* v. *Swansea Zinc Ore Company* (2), the first material date is the presentation of the petition for winding-up. The petition was presented on the 24th of July, 1893, and the order appointing the receiver was not made until the 2nd of August, 1893.

It seems to me that the rule is really established—that if nothing else appears, *primâ facie* the Court, in order to prevent two persons performing the same duties, will appoint one as receiver or receiver and manager, that one being the liquidator.

Now let us see whether there is anything in this case which ought to prevent me from applying that rule. I wish to say that in my judgment it is a rule which may easily be displaced. It is only a *primâ facie* rule of practice; if justice or convenience requires it, the rule will be displaced; and if there is any reasonable ground for supposing that the rights of the debenture-holders or mortgagees will be in any way affected or diminished in fact, that is, I take it, quite sufficient to make the Court depart from this *primâ facie* rule. As I have already intimated, in *Strong* v. *Carlyle Press* (3) there was an amply sufficient reason for departing from the rule, because there the assets, admittedly, were altogether insufficient to pay the debts due to the debenture-holders, and the Court was only following the well-established rule in taking care that the administration should be granted to those who had an exclusive interest in the realization.

Then, what other reasons are suggested by those who support the application? It cannot be suggested here, as it was in *In re Joshua Stubbs, Limited* (4), that there is no uncalled capital to be

(1) Law Rep. 5 Ch. 520.
(2) W. N. (1884) 54; 32 W. R. 716.
(3) [1893] 1 Ch. 268.
(4) [1891] 1 Ch. 187; on appeal, [1891] 1 Ch. 475.

realized. It is quite true that the debentures in this case cover the uncalled capital, and it is quite true, therefore, that the first right or charge in respect of the uncalled capital is the right of the debenture-holders; but it is quite plain that the uncalled capital to the extent of £2 per share (which, I am told, amounts in the aggregate to £300,000) will be most conveniently collected through the intervention of the liquidator. The fact that the Court of Appeal, in *In re Joshua Stubbs, Limited* (1), stopped the argument when it ascertained that there was only a sum of £180 of uncalled capital to be collected, is very strong to shew that the Court of Appeal would have given the greatest weight to the fact (if it had been the fact in that case) that there was a large amount of uncalled capital to be collected; and therefore I cannot dispose of this case upon that ground. Now, is any other ground suggested? We start, in the first instance, by sending down the scale in favour of the appointment of the liquidator by reason of the rule in *Perry* v. *Oriental Hotels Company* (2). Is there anything to reverse the position of the scales? It is not that the debenture-holders have the exclusive interest; it is not that there is no uncalled capital to collect. The reason suggested by Mr. *Moulton*, as I understand it, is that the assets are of such a character that they are likely to be more effectively and advantageously collected by an accountant like Mr. *Touch*, the receiver and manager who has been appointed, than they could be by the Official Receiver. That is an argument to which, speaking for myself, I should be extremely willing to attend. In the course of the past twelve months I have thoroughly satisfied myself that there are many cases in which the administrations are of such a character that the Official Receivers, however able or zealous they may be, are not the most appropriate and fitting persons to act. It seems to me that wherever there is a business to be carried on, wherever there are commercial transactions to be entered into, wherever there is buying and selling, wherever there is borrowing of money necessary in order to put the property to be administered in such a condition that it can be taken into the market, in all those cases, and many other similar cases, the Official Receivers cannot in the

(1) [1891] 1 Ch. 475. (2) Law Rep. 5 Ch. 420.

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nature of things perform their duties nearly so well as a commercial liquidator can do; and if I thought here that there was something in the nature of the securities to be realized and the moneys to be collected which required negotiations and bargainings and compromises, I should think that that was a function much better performed by an accountant than by an officer of the Court, even though assisted by a great department like the Board of Trade. But I have looked at this list of securities, and I am not at all satisfied that that is the nature of the securities. With regard to the *Murietta* securities, inasmuch as that estate, as I understand, is in liquidation in another Court, it is plain that the only duty of the receiver, whoever he is, will be to receive such moneys as may be ordered to be paid to him in the administration by the Court. With regard to the investments, I have looked at the list of them, and they may or may not be *Stock Exchange* securities—I daresay Mr. *Moulton* is right when he says that they are not—but still it does not seem to me that they are securities with regard to which there is anything else to be done than to employ a broker to sell them. Under these circumstances, Mr. *Moulton* (and the *onus* is on him) has failed to satisfy me that there is anything in the nature of the securities which would render it prejudicial, or probably prejudicial, to those who are interested in their realization, to have the realization conducted by the liquidator.

Then Mr. *Moulton* suggests another reason. He says that this is a case, and this is a season, in which it is particularly desirable that debts should be quickly collected. I daresay Mr. *Moulton* is quite right there; but I confess that I cannot assent to the proposition that these debts will be more quickly collected by the receiver appointed at the instance of the debenture-holders than by the liquidator or the Official Receiver. I entirely agree with the proposition laid down again and again, in judgments to which I called Mr. *Moulton's* attention, that it may be presumed that the collection of the uncalled capital by the Official Receiver would be cheaper and more expeditious than the collection by a receiver nominated by the debenture-holders, and it seems to me that that reason fails. I wish to add that, not having any authority cited to me on the point, I still very much doubt whether

actions could properly be brought for collection of calls made after the commencement of the liquidation. But I have not got to decide the question, and I had better leave that matter open.

I believe I have now gone through most of the matters Mr. *Moulton* relied on, and the conclusion I have come to is this: that there is a general rule that, where you have got an order for compulsory winding-up—at all events when that order is made upon a petition of a date anterior to the appointment of the receiver appointed at the instance of the debenture-holders—*primâ facie* the Court, upon the making of the compulsory order, will discharge the debenture-holders' receiver, and substitute the liquidator. I have also come to the conclusion that, although that rule may easily be displaced by shewing that there will be any prejudice whatever to the debenture-holders if it is followed, Mr. *Moulton* has failed to shew me that there is any prejudice to the debenture-holders whatever in the present case.

I thought it right in the course of the argument to tell Mr. *Moulton* that, according to my judgment, if the Court did appoint as receiver a nominee of the debenture-holders, it would be the duty of the Court to take care that the liquidator did everything which he reasonably could be asked to do, upon a proper indemnity, to enable the mortgagees to realize their property, including the uncalled capital when that is covered by their security; but, although I am strongly of the opinion that that is so, it is perfectly plain from the whole current of the authorities that the Court does in these cases take into consideration, as a ground for appointing the Official Receiver or the liquidator to be the receiver, that he will have special facilities for collecting the uncalled capital, and the Court treats that as a matter to be taken into consideration, although I doubt whether all the Judges who have had to deal with this matter would assent to the proposition which I put to Mr. *Moulton* in the course of his argument. There is a case which I intended to have mentioned before. I will not trouble to deal with it farther than mention it. It is a case before Vice-Chancellor *Bacon* of *Campbell* v. *Compagnie Générale de Bellegarde* (1), in which he affirms the

(1) 2 Ch. D. 181.

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rule as to the appointment of a liquidator under these circumstances in the very forcible language in which his judgments are invariably couched.

I shall discharge Mr. *Touch* from being receiver and manager, and order that the provisional liquidator be appointed receiver in the debenture-holders' action, he undertaking to keep a separate account as offered by the notice of motion.

F. E.

After the order of Mr. Justice *Vaughan Williams* the *Industrial and General Trust*, who were holders of debentures of the second class, were added as Plaintiffs, and the action was by them and the *British Linen Company*, on behalf of themselves and the other debenture-holders of the second class.

The Plaintiffs appealed, and on the appeal adduced further evidence. Mr. *Trotter*, a member of the firm of *James Capel & Co.*, stockbrokers, deposed that he had examined the list of the investments of the company and the list of the securities held by the company in respect of loans made to various companies, which lists were exhibited and marked A and B; that he was well acquainted with a large number of the securities mentioned in the lists, and was certain from the nature of many of them that it would require much preliminary work, a previous knowledge of the affairs of the various undertakings, and also numerous negotiations and bargainings, and, in a number of instances, careful and judicious management, to endeavour to obtain purchasers, and that it was utterly impossible for any one, however able, who had no previous experience in the *London* financial world, and no special knowledge of the quarters in which arrangements for sale could probably be effected, to realize the assets so well as Mr. *Touch*, the receiver appointed in the action, who from his large experience of financial affairs in the City was specially qualified to act with advantage to all concerned; that some of the investments were securities of incomplete undertakings, and though in some instances they were quoted in the official list of the *Stock Exchange*, the quotations were purely nominal, and no sale at any reasonable price could be effected by merely giving an order to a broker to sell, and that the amount realized would

depend almost entirely upon whether those interested in them were in a position to obtain financial assistance for the undertaking, which Mr. *Touch* had exceptional opportunities of doing; that the case was not one where the receiver for the debenture-holders had merely to employ a broker to sell, and that if that course was taken the position of the debenture-holders would be most seriously imperilled. Mr. *Mitchell Henry* gave evidence to a like effect.

Mr. *Barnes*, the Official Receiver, by his affidavit deposed that he was well aware of the nature of the securities forming the assets of the company; that assets of a similar character had been dealt with in the Official Receiver's department in other windings-up, and that he had no intention of handing the securities over to a broker for realization, and that the Official Receiver's department had every facility for obtaining the advice, and did continually obtain and act on the advice of experts, in dealing with assets of this description. He further stated that, in his opinion, there would, after payment of the secured debts of the company, be a substantial surplus for distribution among unsecured creditors.

On the day before the day on which the appeal was heard the Official Receiver held that the debenture-holders had no voice in the appointment of the committee of inspection.

The appeal came on for hearing on the 8th of November, 1893.

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Sir *H. James*, Q.C., *Moulton*, Q.C., and *E. J. Elgood*, for the appeal:—

The nature of the property to be realized is such that it can be much better realized by a man mixed up in commercial transactions than by the Official Receiver, for it consists in a great measure of securities for which there is no market. That officer himself says he should not merely hand them to a broker; but the judgment of Mr. Justice *Vaughan Williams* proceeds on the view that that is all he would have to do. The debenture-holders are deeply interested in the realization; their margin is at best very narrow, and the value of some part of the assets is speculative. So that, unless there is an advantageous realization, there

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may be a deficiency. As regards the unpaid capital, it has all been called up, and more money will be obtained and more promptly by the receiver suing for the calls than by resorting to balance orders. In *In re Joshua Stubbs, Limited* (1), the difference between a receiver appointed by the debenture-holders under a power and a receiver appointed by the Court is dwelt upon; but the Court will have regard to the fact that the debenture-holders here have a power to appoint a receiver, though it has not been exercised; and in *In re Joshua Stubbs, Limited*, the Court refused to displace a receiver who had been appointed by the Court. In *Strong* v. *Carlyle Press* (2) the Court of Appeal discharged an order which substituted the liquidator for the receiver.

[LINDLEY, L.J.:—In that case the receiver was simply discharged. Here there are provisions for your benefit.]

Since the decision in that case it has been generally considered that debenture-holders, who are in fact mortgagees of a company, stand in the same position as other mortgagees, and have a right to realize their security. When the security is sufficient, it is best that the mortgagor should realize the mortgaged property; but when there is reason to expect insufficiency the mortgagee is the proper person.

[A. L. SMITH, L.J.:—Does not a mortgagee who applies to the Court for a receiver submit to the jurisdiction so as to enable the Court to interfere with his rights?]

The principle on which the Court will act is that if you interfere with a secured creditor you must pay him off. Debentures now have assumed an importance which they had not in the earlier days of companies. At the present time nearly all the money with which companies carry on business is borrowed money. Before the Court displaces the receiver of the mortgagees, it must be satisfied that the step will not prejudicially affect the mortgagees. We rely on these grounds—viz., that the mortgagee of a company has the ordinary rights of a mortgagee, that he will not be deprived of his natural right to get in the assets unless he shews himself unreasonable, and that the Official

(1) [1891] 1 Ch. 187, 475. (2) [1893] 1 Ch. 268.

Receiver is not a good person to get in assets of this peculiar nature.

*Kirby*, for the trustees of the debenture trust deed, who in their own right were interested in debentures of the second and third classes, supported the appeal.

*Everitt*, Q.C., and *Howard Wright*, for the Official Receiver:—

The assets are ample to meet the first and second classes of debentures, and the receivership only applies to them. Their amount is about half the estimated value of the assets. From *Perry* v. *Oriental Hotels Company* (1) downwards, the Court has said it will not employ two officials to get in the assets; and if there is sure to be a surplus after satisfying the persons for whom a receiver has been appointed, the Court will substitute the liquidator for him—though we do not dispute that if there is nothing for anybody except the debenture-holders they are entitled to retain their receiver. If the Appellants succeed, it will be against the spirit of the *Companies (Winding-up) Act*, 1890, s. 4, sub-s. 6, which enacts that the Official Receiver may be appointed receiver for the debenture-holders. Sect. 5, sub-sect. 1, provides for the appointment of a special manager where necessary. By sect. 6, sub-sect. 1 (*b*), provision is made for the appointment of a committee of inspection, which is to be appointed on behalf of creditors as well as contributories. Sect. 9 and sect. 23, sub-sects. 1 and 2, shew the power given by the Act to the committee and to general meetings. There is no use in all these provisions if the liquidator is to be excluded in all cases where there is something special about the assets.

Sir *H. James*, in reply:—

I do not admit the allegation that if the Appellants succeed the provisions of the Act of 1890 will be made useless. Sect. 4, sub-sect. 6, was necessary, because under the former Acts the liquidator did not represent the debenture-holders, and in no respect acted in their interest. If the construction put upon sects. 6 and 23 of this Act by the Official Receiver is correct,

(1) Law Rep. 5 Ch. 420.

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that the debenture-holders are to be excluded from voting at meetings under those sections, it is plain that the Act does not help the debenture-holders. The Official Receiver will act with a view to the interests of the contributories, and may delay the conversion of the assets unreasonably with a view to leaving a surplus for them.

1893. Nov. 9. LINDLEY, L.J.:—

This is an appeal on behalf of certain debenture-holders against an order made by Mr. Justice *Vaughan Williams*, appointing the liquidator of the *South American and Mexican Company* receiver of all the property pledged to the debenture-holders, including the uncalled capital. The case is somewhat singular. It appears that the *South American and Mexican Company* has issued a great number of debentures. There are four or five series, and the action before us is an action on behalf, not of all the debenture-holders, but of those who hold the first and second issues, the subsequent debenture-holders not being represented at all. It appears that a writ in a common debenture-holders' action, except that it was not on behalf of all the debenture-holders, was issued on the 26th of July, 1893. Two days before this a petition had been presented for winding up the company, and on the 2nd of August the usual winding-up order was made, so that the commencement of the winding-up dates from the 24th of July. Mr. *Touch* was appointed receiver in the debenture-holders' action, provision being made for associating Mr. *Lock* with him after the first debenture had been satisfied. On the 25th of October that order was discharged, and the Official Receiver, who had of course the conduct of the winding-up, was appointed receiver in his stead. The application before us is to discharge that order, and appoint Mr. *Touch* receiver in the place of Mr. *Barnes*.

The judgment of Mr. Justice *Vaughan Williams* was read yesterday, and it appears to me that he proceeded upon right principles from first to last. He started with the view which was expressed by the late Lord Justice *Giffard* in *Perry* v. *Oriental Hotels Company* (1), and was reiterated and affirmed by this Court

(1) Law Rep. 5 Ch. 420.

in the case of *In re Joshua Stubbs, Limited* (1), and again in *Strong* v. *Carlyle Press* (2), that if having two receivers can be avoided the Court ought to avoid it, it being a mere waste of assets and a public inconvenience and injustice to have two or three people winding up the same company. There can be no objection, under ordinary circumstances, to appointing the liquidator receiver for the debenture-holders. When that is done in an ordinary case, the debenture-holders really have nothing to complain of except that their particular man is not appointed. Where the point in dispute is whether the debenture-holders are to have a receiver at all, the question who the receiver is to be assumes a totally different aspect, and the debenture-holders are entitled to a receiver. That right was overlooked by the Court below in *Strong* v. *Carlyle Press*; but it has been recognised in the present case, and the debenture-holders have a receiver.

I think, therefore, that the decision of Mr. Justice *Vaughan Williams* went on right principles; but the evidence which has been adduced here since the case was before him has drawn pointedly to our attention the fact that the great mass of the assets of this company which are pledged to the debenture-holders are of such a nature that it is difficult to suppose that they can be realized in the best way for the debenture-holders by a mere official of the Court. I say that without in any way disparaging Mr. *Barnes*, who is well known to be an able and competent man. But there are kinds of things which it is extremely difficult for him or for anybody else to do who is not in touch with the financial world; and when we look at the assets specified in the Lists A and B appended to Mr. *Trotter's* affidavit, I confess we are very much struck with the peculiar nature of those assets, and the extreme difficulty in a business point of view of realizing them.

That being so, the question is what ought to be done. Several courses are open to the Court. Sometimes one course will be more expedient—sometimes another. Mr. *Howard Wright* was quite right in drawing our attention to the Act of 1890, and in pointing out that it has considerably modified the law relating to the winding up of companies. It has, for reasons which

(1) [1891] 1 Ch. 475. (2) [1893] 1 Ch. 268.

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commended themselves to Parliament, placed the winding up of companies more or less under the Board of Trade, and has assimilated to a certain extent the winding up of companies to the proceedings in bankruptcy, and put them under one official department. The machinery employed by the *Companies Act*, 1862, was defective, and was known to be so from an early period after the Act was passed. Provision was not made for that which is now practically speaking the common form of winding up, viz., a debenture-holder's action. The constitution of companies has so changed within the last twenty-five years that nothing is more common now than for a liquidator of a company to have next to nothing to do, and for the real winding up to be done by the receiver in the debenture-holders' action. The defect in the machinery has not been fully cured by the Act of 1890, for the machinery of that Act is such that it cannot be easily applied to debenture-holders' actions. The mischief has been met partially by transferring the debenture-holders' actions to the Judge who has the conduct of the winding up of the company; and unquestionably, whatever course the Court may take in dealing with such actions in the winding up, it ought not to overlook the extreme importance of having no conflict of jurisdiction, and no conflict between the debenture-holders' receiver on the one hand and the Official Receiver on the other.

What course, then, ought the Court to take? One course is that suggested by the Appellants: "Place the whole of this winding-up in the hands of the receiver of the debenture-holders." I do not think that is requisite for the protection of the debenture-holders, and I do not think it would be right. Another course is to let this motion stand over to have a meeting of the debenture-holders convened, and take their views as to whether they would desire these particular assets to be realized by a gentleman chosen by themselves. If I thought there was any doubt about that, I should probably suggest that course as the right course to be pursued; but having regard to the willingness of the Plaintiffs to turn the action into an action on behalf of all the debenture-holders, I am satisfied that if the debenture-holders were consulted they would also desire that Mr. *Touch* should realize these exceptional assets. Another course is to

appoint Mr. *Touch* joint receiver with the official liquidator. I doubt whether that would work so easily and inexpensively as the course which we think is the right one, viz., to appoint Mr. *Touch* receiver of these particular securities—that is to say, of the bonds and shares, and debentures and stocks in the lists A and B, leaving Mr. *Barnes* receiver of all the rest of the assets including the uncalled capital. Nothing can possibly be gained by handing over to the receiver of the debenture-holders those ordinary duties which the Official Receiver is daily in the habit of performing. He is by far the best man to make calls and get in the general assets. But these particular assets are of a totally different class. After having seen the affidavits which have been filed since the case was before Mr. Justice *Vaughan Williams*, we have been in communication with him, and the order which we propose to make has his assent. [His Lordship read the order, which is given at the end of the report.]

I see the order of Mr. Justice *Vaughan Williams* appoints Mr. *Barnes* receiver and manager. That is very unusual, and I see no necessity for it. Mr. *Touch* ought to be appointed receiver only of the special assets with the powers which I have mentioned, and Mr. *Barnes* the receiver only of the other assets of the company. That will enable him to wind up the company and get in all the assets which do not require the special attention to which I have alluded.

A. L. Smith, L.J.:—

This is an appeal from an order of Mr. Justice *Vaughan Williams* by which he discharged an order appointing Mr. *Touch* receiver and manager on behalf of the debenture-holders, and appointed in his place the Official Receiver. The question is whether upon the facts as they now appear before us (which are not the same as appeared before Mr. Justice *Vaughan Williams*) that order should stand, or whether it should be varied.

No one cavils at the judgment of Mr. Justice *Vaughan Williams* with regard to the law which he laid down, or with regard to the rule which he extracts from the decided cases. That rule, as he enunciated it, is this: that where the duties to be performed by the liquidator and the receiver will be identical and

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such as should be performed by one person, the Court (if nothing more appears) will generally appoint the liquidator to perform those duties; the reason being, that if that were not so there would be two persons engaged in the winding up of the company, which would cause additional expense and would cause conflict between the two. Now, Mr. Justice *Vaughan Williams* having laid down the rule accurately, then made this statement, with which I entirely concur: "It seems to me that wherever there is a business to be carried on, wherever there are commercial transactions to be entered into, wherever there is buying and selling, wherever there is borrowing of money necessary in order to put the property to be administered in such a condition that it can be taken into the market, in all those cases, and many other similar cases, the Official Receivers cannot in the nature of things perform their duties nearly so well as a commercial liquidator can do; and if I thought here that there was something in the nature of the securities to be realized and the moneys to be collected which required negotiations and bargainings and compromises, I should think that that was a function much better performed by an accountant than by an officer of the Court, even though assisted by a great department like the Board of Trade." With that statement of my Brother *Vaughan Williams* I entirely agree. It must not for a moment be thought that I in any way doubt the capacity of Mr. *Barnes* to act as the Official Receiver. We have all known him for many years, and felt him to be a gentleman perfectly competent to fill the position he now holds. Then my Brother *Vaughan Williams* goes on: "But I have looked at this list of securities, and I am not at all satisfied that that is the nature of the securities. With regard to the *Murietta* securities, inasmuch as that estate, as I understand, is in liquidation in another Court, it is plain that the only duty of the receiver, whoever he is, will be to receive such moneys as may be ordered to be paid to him in the administration by the Court. With regard to the investments, I have looked at the list of them, and they may or may not be *Stock Exchange* securities—I daresay Mr. *Moulton* is right when he says that they are not—but still it does not seem to me that they are securities with regard to which there is anything else to be done

than to employ a broker to sell them." If there were here no bargainings, no negotiations, and no compromises necessary, and no buying and selling out of the ordinary way, I think the Official Receiver is a competent and proper person to realize these securities. It appears however from the affidavits of Mr. *Trotter* and Mr. *Mitchell Henry* that these peculiar securities cannot be sold except at a ruinous loss by the employment of a broker to sell them. Mr. *Barnes*, in answer to these affidavits, says that he is not going to sell these securities through the ordinary channel of employing a broker, but in some other way, and that he shall take advice of certain gentlemen in his office as to what is the best way of realizing them; so that Mr. *Barnes* in no way contradicts the affidavits of Mr. *Trotter* and Mr. *Mitchell Henry*, but confirms them by saying that he is not going to employ a broker to sell—which is cogent to shew that the securities cannot be sold as ordinary securities are sold on the *Stock Exchange*. That entirely alters the character of the case from what it was when before Mr. Justice *Vaughan Williams*, and shews that it is a case in which there must be bargainings, negotiations, and compromises, and that, therefore, according to Mr. Justice *Vaughan Williams'* own judgment, the Official Receiver is not the best person to realize the securities.

But it is said that, even if that be so, he ought to be allowed to realize these securities, because there is no danger to the debenture-holders, there being such a large margin in the estimated assets, and that even if they were not realized to the best advantage there is enough to cover the debentures. There would indeed be a considerable margin if only the first and second classes of debentures were taken into account; but if we allow, as we do allow, the subsequent debenture-holders of the third, fourth, and fifth classes to be added as Plaintiffs, the margin seems to me so small that there is danger to the debenture-holders if these securities are not realized to the best advantage.

For these reasons it appears to me that Mr. Justice *Vaughan Williams'* order should be varied. There was one other point put very forcibly by Mr. *Howard Wright* on the *Companies (Winding-up) Act* of 1890. "Why," said he, "do the debenture-

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holders want a receiver of their own when there is a committee of inspection appointed to see that this winding up is done to the best advantage of everybody?" The answer to that is this: the debenture-holders have been ruled out (it may be properly ruled out) from voting in the election of members of that committee of inspection, and have consequently had no voice as to who are to compose that committee.

It seems to me, therefore, that in this case the order of my Brother *Vaughan Williams* should be varied in the way that has been read by Lord Justice *Lindley*.

LINDLEY, L.J.:—

I may merely add, with reference to the ruling out of the debenture-holders, that we do not know the facts about it; but it strikes me that the Official Receiver was right, because the debenture-holders stand on their debentures and do not come in in the winding-up.

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ORDER.—The Plaintiffs undertaking to amend the writ so as to make the action one on behalf of all the debenture-holders, vary the order. Appoint Mr. *Touch*, on giving security, receiver of the shares and stocks bonds and debentures mentioned in the lists A and B referred to in Mr. *Trotter's* affidavit with power to realize the same by sale or otherwise and with liberty to apply to the Judge in Chambers for leave to institute in the name of the company such legal proceedings if any as may be necessary for that purpose.

Appoint Mr. *Barnes* the receiver of all the other assets of the company.

Costs costs in the action.

Solicitors for Plaintiffs: *W. A. Crump & Son.*

Solicitors for Official Receiver: *Freshfields & Williams.*

Solicitors for trustees for debenture-holders: *Ashurst, Morris, Crisp & Co.*

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## HILL *v.* WALLASEY LOCAL BOARD.

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[1892 H. 1490.]

*Local Government—Water Supply—"Street"—Private Road—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 54, 57, 308.

The Plaintiff was the owner of a private road in the *W.* district. The Defendants were the urban sanitary authority of the district, and had the control of the streets generally in that district, and also the power of supplying the inhabitants with water. The Defendants commenced, without the Plaintiff's consent, to break up his private road for the purpose of laying down water-mains. The Plaintiff brought an action for an injunction:—

*Held*, by the Court of Appeal (*A. L. Smith*, L.J., dissenting), that the words "where the local authority have not the control of the streets," in sect. 57 of the *Public Health Act*, 1875, which forbids the laying down of pipes in any private road without the consent of the owner, are descriptive of a local authority who have not the control generally of the streets in their district, and had no application to the Defendants; and that the Defendants had power under sects. 16 and 54 of the *Public Health Act*, 1875, to lay down pipes in the Plaintiff's private road without his consent, making him proper compensation under sect. 308 of the same Act.

A private road is a "street" within the meaning of sects. 16 and 54 of the *Public Health Act*, 1875.

The decision of *Kekewich, J.*, in *Hill* v. *Wallasey Local Board* (1), reversed.

THIS was an appeal from a judgment of Mr. Justice *Romer*. The facts were shortly as follows: In March, 1891, certain lands in the parish of *Wallasey*, in the county of *Chester*, were conveyed to the Plaintiff in fee simple. The property included so much of a road called "*Sea View Road*" as passed through the lands purchased. This part of the road had, for about forty years prior to the purchase, existed as a private road, and the Plaintiff still claimed it as such. The road now formed the continuation of a road running north and south, starting from the village of *Liscard*, which lay to the south of the Plaintiff's property; and the portion of the road between *Liscard* and the point where it entered the Plaintiff's property belonged to the

(1) [1892] 3 Ch. 117.

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Defendants, the *Wallasey Local Board.* The entire road had for some years become a main thoroughfare from *Liscard* to a district lying beyond the Plaintiff's property, and the Defendants had, under sect. 150 of the *Public Health Act*, 1875, constructed a footpath along one side of the Plaintiff's portion of *Sea View Road.* The Plaintiff after purchasing the property proceeded to develop it as a building estate, and had already sold for building purposes various plots of land along each side of his portion of the road.

At the southern end of his portion of the road the Plaintiff, on purchasing the property, put up a notice-board marked "Private Road," and at the northern end was an old gate, but there was a conflict of evidence whether the gate was usually kept open or locked. In April, 1892, the Defendants, who were the local authority of the *Wallasey* district, without notice to the Plaintiff and without any consent on his part, commenced excavating a trench at the southern end of the Plaintiff's portion of the road for the purpose of laying down water-mains for conveying water from a well in the neighbourhood to part of their district lying beyond that property, and for supplying ratepayers along the road; whereupon the Plaintiff commenced the present action, and obtained an interim injunction restraining the Defendants from interfering with the soil of the Plaintiff's portion of the road, and from laying down pipes therein until the trial of the action or further order.

The order was made by Mr. Justice *Kekewich* on the 27th of May, 1892 (1).

When the action came on for trial, Mr. Justice *Romer*, to whom the action had been transferred, made the injunction perpetual; and the Defendants appealed from this judgment.

The sections of Acts of Parliament specially referred to in the argument were the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), sects. 4, 16, 54, 57, 308, and the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), ss. 28, 29, 30, 31 (2).

(1) [1892] 3 Ch. 117.

(2) 38 & 39 Vict. c. 55, s. 4: "Street," if not inconsistent with the context, is defined as including "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not."

Sect. 16: "Any local authority may

*Cozens-Hardy*, Q.C., and *Cann*, for the Appellants:—

It is at least questionable whether the road which has given rise to the dispute in this action is not a public road; but we are

carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street . . . . and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary) into through or under any lands whatsoever within their district."

Sect. 54: "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

Sect. 57: "For the purpose of enabling any local authority to supply water there shall be incorporated with this Act the *Waterworks Clauses Act*, 1863, and the following provisions of the *Waterworks Clauses Act*, 1847—namely, 'With respect' (where the local authority have not the control of the streets) 'to the breaking up of streets for the purpose of laying pipes.' . . ."

Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers. . . ."

The provisions of the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), with respect to the breaking up of streets for the purpose of laying pipes, are contained in sects. 28 to 34 of that Act.

Sect. 28: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same . . . . and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 29: "Provided always, that nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe, conduit, service pipe, or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof. . . ."

Sect. 30: "Before the undertakers open or break up any street, bridge, sewer, drain, or tunnel, they shall give to the persons under whose control or management the same may be, or to their clerk, surveyor, or other officer, notice in writing of their intention to open or break up the same, not less than three clear days before beginning such work, except in cases of emergency arising from defects in any of the pipes or other works, and then so soon as is possible after the beginning of the

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content to argue the case upon the assumption that it is a private one. We contend that this road is a "street" within sect. 16 of the *Public Health Act*, 1875. This has been decided in *Taylor* v. *Corporation of Oldham* (1), which was approved of in *Midland Railway Company* v. *Watton* (2); *Coverdale* v. *Charlton* (3). The board, therefore, have full power to lay the mains in this road under sects. 16 and 54 of the same Act, and no injustice will be done, because the owner may be compensated under sect. 308. It is contended by the Respondent that their powers are restricted by sect. 57, which incorporates sects. 28 to 34 of the *Waterworks Clauses Act*, 1847; but the powers given by those sections were intended to be cumulative, and not to restrict the powers given by the *Public Health Act*. This is made clear by sect. 341. Moreover, these clauses of the *Waterworks Clauses Act* only apply to cases where the local authority have not the control of the streets, as in the case of ordinary rural authorities; but in the present case the board have the control of the streets throughout their district. Therefore those clauses are not applicable.

*Neville*, Q.C., and *MacConkey*, for the Plaintiff:—

The road in this case is not a "street" within the meaning of the Act, and the Defendants have no power to break it up under sects. 16 and 54 of the *Public Health Act*. A street means a road running in front of a row of houses. *Taylor* v. *Corporation of Oldham* is distinguishable, for there there was a row of houses on each side. That is not so in the present case. The word "street" ought to be taken in its natural sense: *Robinson* v. *Local Board for Barton* (4). In *Coverdale* v. *Charlton* the road had become a public highway. The powers of the *Public Health Act* are controlled by the 57th section which incorporates

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work or the necessity for the same shall have arisen."

Sect. 31: "No such street, bridge, sewer, drain, or tunnel shall, except in the case of emergency aforesaid, be opened or broken up, except under the superintendence of the persons having the control or management thereof, or of their officer. . . ."

(1) 4 Ch. D. 395, 408.

(2) 17 Q. B. D. 30.

(3) 4 Q. B. D. 104.

(4) 8 App. Cas. 798, 801.

clauses 28 to 34 of the *Waterworks Clauses Act*, under which a private road cannot be broken up without the consent of the owner. Those clauses are applicable wherever the local authority have not the control of the streets—that means the streets which they propose to deal with—and the Defendants have not the control of the road in this case, for it is a private road.

*Cozens-Hardy*, in reply.

1893. Nov. 16. LINDLEY, L.J.:—

This is an appeal by the Defendants against an injunction restraining them from breaking up a private road belonging to the Plaintiff, and from laying water-mains and pipes along the same. The Defendants at one time asserted that the road was a public road; but this point was decided against them, and it is now conceded that the road is the Plaintiff's private property, and that there is no public right of way over it. The Defendants are the urban sanitary authority for *Wallasey*, in *Cheshire*, and by various private Acts they are empowered to supply the inhabitants of that district with gas and water. By a provisional order made in 1853 and confirmed by the statute of 16 Vict. c. 24, the *Public Health Act*, 1848 (except sects. 50 to 109), and portions of the *Towns Police Clauses Act* (10 & 11 Vict. c. 89), and of the *Towns Improvements Clauses Act* (10 & 11 Vict. c. 34), were made applicable to the Defendants' district. By these Acts the Defendants acquired the control and management of the public streets within their district, and some powers over private streets were conferred by later statutes: see the *Wallasey Improvement Acts* of 1864 (sects. 29 to 34) and 1867 (sects. 2, 6, 15, 16). By a private Act passed in 1858 (21 and 22 Vict. c. lxiii.), the Defendants obtained power to supply the inhabitants of their district with gas and water. This Act incorporated the *Lands Clauses Consolidation Act* and the *Waterworks Clauses Act*, 1847 (except sects. 75 to 83), and for the purposes of affording such supply the Defendants were to be treated as "undertakers" and "promoters of the undertaking" within the meaning of those *Consolidation Acts*: see sect. 5 of the Act of 1858.

The Plaintiff's road is within the Defendants' district. But

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the road being a private road, the Defendants had no power under any of the Acts as yet referred to to break it up without his consent. Their power to take the road compulsorily under the *Lands Clauses Act* expired long ago, and could not now be exercised, even if they desired to exercise it, which, however, they do not and never did.

The Defendants, as I understand, admit all that I have stated to be true. They contend, however, that they have the power to break up the road and to lay water-mains in and under it without the Plaintiff's consent by reason of the powers conferred on local authorities by the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), which I now proceed to examine. Having regard to the definition clause in the *Public Health Act*, 1875, *i.e.*, sect. 4, and to previous decisions upon it, the Plaintiff's road is, in my opinion, a "street" within the meaning of that Act. Sect. 16 authorizes the Defendants to lay sewers along "streets" and other places, and sect. 54 authorizes them to lay water-mains to the same extent as they are authorized to lay sewers. [His Lordship read these two sections.] The powers conferred by these sections are far greater than any conferred by the Defendants' private Acts and the Acts incorporated with them. There is a compensation clause (sect. 308) which will entitle the Plaintiff to compensation for any injury he may sustain by the exercise of the powers thus conferred on the Defendants. Now, unquestionably, if there were nothing more in the Act of 1875 these sections would justify the Defendants in laying water-mains along the Plaintiff's road without his consent, but on the terms of making him compensation for any damage he might sustain by their so doing. But the Plaintiff contends that sect. 54 of the Act of 1875 is controlled and cut down by sect. 57, and the case really turns upon this point. [His Lordship read sect. 57.] This section, it will be observed, is an enabling and not a restricting section; and an enabling section, *i.e.*, a section conferring additional powers on those who want them, ought not to be construed as a disabling section or as restricting more extensive powers conferred by other sections of the same or any other statute. Moreover, by sect. 341 the powers conferred on local authorities by the Act in question are expressly declared to be in

addition to any other powers they may have. [His Lordship read sect. 341.] But under their private Acts and the Acts incorporated therewith the Defendants can lay down water-mains in the Plaintiff's road with his consent, and they do not require the aid of sect. 57 of the *Public Health Act* of 1875 to enable them to exercise the powers therein mentioned. The Defendants are in this position. They do not want to invoke sect. 57, but they want the additional powers conferred on them by sect. 54. The combined effect of the special Acts and of sects. 16, 54, 308, and 341 of the *Public Health Act*, 1875, is, in my opinion, to empower the Defendants to lay water-mains along the Plaintiff's road, making him all proper compensation for any injury they may do to him.

Much of the discussion before us was addressed to the meaning in sect. 57 of the words, "Where the local authority have not the control of the streets." These words appear to me to have the same meaning as similar words have in those sections of the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), which relate to the breaking up of streets by public authorities, viz., sects. 28 to 34. In those sections the expression "persons having control of the streets" is apparently used by way of contrast to "owners and occupiers," and the streets referred to as under control are apparently public streets and roads, and not private property over which there is no public right of way: see the definition of "street" in sect. 3 of the *Waterworks Clauses Act*, 1847. If this be so, the Defendants are a local authority having control of the streets within the meaning of those words in sect. 57, and the restriction, if any, imposed by sect. 57 does not apply to them. The restriction placed by that section on those local authorities, if any, who fall within sect. 54, but have not control of the streets, cannot, in my opinion, apply to the Defendants, who are a local authority having control of the streets.

Were it not for the compensation clause (sect. 308) the construction which I put on the *Public Health Act*, 1875, would lead to great injustice, and this circumstance would afford a strong argument against such construction. But, having regard to the compensation clause, no injustice is done to the Plaintiff, and no reason based on injustice can be urged in favour of the

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construction contended for by him. The appeal ought to be allowed with costs, and the action ought to be dismissed with costs, except so far as they have been increased by asserting the road to be a public highway, and those increased costs the Defendants ought to pay.

A. L. SMITH, L.J.:—

The question in this case depends upon the construction of some sections of the *Public Health Act*, 1875, and of the *Waterworks Clauses Act*, 1847, incorporated therewith, the point being whether the *Wallasey* Local Board are entitled to enter upon land which is the private property of Mr. *Hill*, undedicated to the public use, and lay water-mains and pipes therein without his consent. Mr. Justice *Kekewich* held that they were not, and the board appeals.

By sect. 54 of the Act of 1875 it is enacted, that "where a local authority supply water within their district"—this is what the *Wallasey* Local Board are and do—"they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district." By sect. 16 of this Act any local authority may carry a sewer through, across, or under any street or place laid out or intended for a street. Section 4 enacts that the word "street," if not inconsistent with the context, includes any road, lane, or passage, whether a thoroughfare or not, and it has been held by authority which cannot in this Court be questioned that the word "street" in the Act includes any road, lane, or passage, whether public or private property: see the judgment of Sir *George Jessel*, M.R., in *Taylor* v. *Corporation of Oldham* (1), approved of in this Court in the case of the *Midland Railway Company* v. *Watton* (2). In these circumstances it appears to me that the land belonging to Mr. *Hill*, through which the local board are proposing to carry the water-mains, is a "street" within the meaning of the Act of 1875, and that if it were not for sect. 57 of this Act, which I have now to consider, the board could do what it proposes without the consent of Mr. *Hill*.

(1) 4 Ch. D. 408. (2) 17 Q. B. D. 30.

Sections 16 and 54, however, cannot, in my judgment, be read alone; they must be read in conjunction with sect. 57. If the local board require, as they do, the enactments in sect. 54, they must take that section coupled with sect. 57. It will be noticed that sects. 54 and 57 are part of a group of sections, commencing at sect. 51 and ending at sect. 70, in the Act of 1875, under the heading of "Powers of local authority in relation to supply of water." When sects. 16, 54, and 57 are read together, they read as follows: "Where a local authority supply water they may carry a water-main across or under any street or place laid out or intended for a street and for this purpose" (this is how I read the words, "for the purpose of enabling," in sect. 57) "there shall be incorporated into this group of sections those provisions of the *Waterworks Clauses Act*, 1847, which relate—(*a*) To the breaking up of streets for the purpose of laying pipes; (*b*) to the communication pipe to be laid either by the undertakers or by the inhabitants; (*c*) to waste or misuse of the water supplied; (*d*) to the provision for guarding against fouling the water; (*e*) and to the payment and recovery of water rates."

Upon referring to sect. 57 it will be seen that these provisions of the *Waterworks Clauses Act*, 1847, with the exception of the provision relating to the "breaking up of streets," are incorporated without any restriction whatever, whereas the provision relating to "breaking up of streets" is only to apply to those local authorities which have not the control of the streets, and consequently if they have such control this one provision is not wanted, and, therefore, is not to apply. The real point in the case is, What is the true reading of the words, "where the local authority have not the control of the streets," in this section?

The incorporated sections of the Act of 1847, which relate to the breaking up of streets, enact that the undertakers (that is, the persons proposing to break up a street for the purpose of laying down water-pipes) shall not break up any street except under the superintendence of the persons under whose control and management such street shall be, and impose penalties if this be done, and also provide for the reinstatement of the street broken up, and every undertaker (by sect. 29) is expressly forbidden from laying down any water-pipe in any land not

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dedicated to public use without the consent of the owners and occupiers thereof.

It is said by the Appellants, the *Wallasey* Local Board, that—inasmuch as they have the control of the streets generally in their district, though not of the particular road in which they are proposing to lay water-pipes, for that is the private property of Mr. *Hill*, undedicated to public use—they are not a local authority which "have not the control of the streets" within the meaning of sect. 57 of the Act of 1875; or, in other words, that they are the local authority which have the control of the streets within the meaning of the section, and therefore the incorporated sections about "breaking up streets," which include the 29th section, do not apply to them.

They point to the words at the commencement of this sect. 57, and assert that it is an enabling, and not in any way a disabling, section. I agree that this section and those incorporated with it are in the main enabling sections; but when a portion of one Act is incorporated with another the whole of the incorporated portion, whether it be enabling or disabling, must in my judgment be read together.

The real question, as before stated, is, What is the true reading of the words in sect. 57, "where the local authority have not the control of the streets"? They can only mean one of two things—either, where the local authority have not the control of the streets in their district generally; or where the local authority have not the control of the streets about to be broken up. If it means the first, as the Appellants contend, what is the local authority pointed at which has not the control of the streets in their district generally? It cannot be an urban sanitary authority, for they have the control of all streets in their district which are highways repairable by the inhabitants at large (sect. 149). They are therefore not a local authority which have not the control of the streets generally. Nor can it, in my judgment, be a rural sanitary authority. Sect. 54 of the Act of 1875, which is the section dealing with the laying down of water-pipes, applies equally to rural and urban sanitary authorities, for sect. 4 enacts that if not inconsistent with the context the expression "local authority," which is that used in

sect. 54, means urban and rural sanitary authorities, and there is no context to the contrary. Moreover, why should a rural sanitary authority be unable to lay down water-pipes in private land without the consent of the owner if an urban sanitary authority, as the Appellants contend, can do so? No answer was given to this, nor do I apprehend that any can be given, for there is no warrant for saying that a rural sanitary authority is in a different position to that of an urban sanitary authority when they desire to lay down water-pipes. This difficulty faces the Appellants upon their construction of sect. 57, and it certainly seems to me that they have been unable to surmount it, not being able to point to a single local authority to which the words in sect. 57 can be held to apply, if the section be read as they read it. It appears to me that, for the reasons I have given, the Appellants cannot avail themselves of a rural sanitary authority to get themselves out of the difficulties they are landed in, upon their reading of the section.

If, however, the other reading be correct, which is the Respondent's reading—viz., "where the local authority have not the control of the streets about to be broken up"—no difficulty arises. Both urban and rural sanitary authorities, which are the two authorities referred to in sect. 54, the section dealing with laying water-pipes, will be included, and everything will run smoothly. The incorporated sections deal with those streets proposed to be broken up, and not with streets in general, in a district; and in these circumstances I ask, Why are not the incorporated sections still to apply? The urban or rural sanitary authority, not having the control of the streets about to be broken up, are in the same position as any other undertakers proposing to lay down water-pipes who have no control over the *locus in quo*, and consequently before they break up such streets they must give to the person, under whose control and management these streets are, the notice provided by the incorporated sections, and also, as they have no control over them, they must obtain the consent of the owners and occupiers. It will be noticed that the *Wallasey* Local Board, under their private Act of 1858, are entitled to payment for the water they supply. In my judgment it is only when a local authority, be it

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rural or urban, have the control of the street about to be broken up that the incorporated sections which apply to the "breaking up of streets" can be dispensed with. This reading of sect. 57, which in my opinion is the correct one, avoids all difficulties, and seems to me to be eminently reasonable.

It does not appear to me that the compensation section in the Act of 1875 (sect. 308) affords any real clue to the true construction of sect. 57. The local authority have or have not the power to enter upon private property undedicated to public use to lay water-pipes without the consent of the owners and occupiers. It is true that it would be most unreasonable if they could do so without making compensation; but still the question remains, Does the Act empower them to do so? In my judgment it does not, and for the reasons above I come to the conclusion that the judgment of Mr. Justice *Kekewich* should be affirmed.

Being of opinion that this is the true reading of sect. 57 of the Act of 1875, Mr. *Cozens-Hardy's* point upon sect. 341 does not arise. I have striven to adopt the views of my Brethren in this case, but I have been unable to do so. I know that I may well be wrong, but having formed the opinion I have I am bound to express it. I think the appeal should be dismissed.

DAVEY, L.J.:—

In this action the Plaintiff seeks to restrain the local board from laying water-pipes under a certain road, called the *Sea View Road*, without his consent. The Defendants in the Court below contended that the piece of road in question is a public road; but before us they admitted, for the purpose of argument at least, that it is the Plaintiff's private road. They claim the right to lay their water-pipes in it under certain sections of the *Public Health Act*, 1875, and the question is whether they have such a right without the Plaintiff's consent. The 54th section of the Act is in these words. [His Lordship read the section.] The powers of the local authority to carry sewers are given by sect. 16. [His Lordship read the section.] This power is very extensive. It enables the local authority to carry their sewer under any "street" within their district without any notice or consent, and under any lands within their district upon giving

notice, if, on the report of the surveyor, it appears necessary. What is a street? By sect. 4 it is enacted that in this Act, if not inconsistent with the context, the following words and expressions have the meanings assigned to them, and it is then enacted that the word "street" includes any road, lane, &c., whether a thoroughfare or not. In *Coverdale* v. *Charlton* (1) the word "street" in this section has been held to include a country lane, though not a street in the ordinary acceptation of the word; and the same meaning has been put upon the word as used in the *Public Health Act*, 1875, in subsequent cases, of which *Fenwick* v. *Rural Sanitary Authority of Croydon Union* (2) is the most recent. In *Taylor* v. *Corporation of Oldham* (3), *Jessel*, M.R., held that the word "streets" in this Act of Parliament "clearly extends to places which are in all respects private, and over which the public have no right." It is to be observed that this case was a decision on sect. 16 of the Act. In *Midland Railway Company* v. *Watton* (4) the decision in *Taylor* v. *Corporation of Oldham* was adopted in this Court. I can find no context either in sect. 16 or sect. 54 inconsistent with our attaching the widest meaning to the word "street," and I am therefore of opinion that as the local authority could carry their sewers under this road without any consent, so, if the matter rested there, they can under sect. 54 carry their water-mains under it also.

But it is said that sect. 57 restricts or qualifies the powers given by sect. 54. One must therefore examine that section and the relevant sections of the Acts of Parliament referred to in it. The first observation to be made is that sect. 57 is an enabling, and not a restrictive, section; but I agree that all the provisions in this group of sections must be read together, and if according to the true construction of sect. 57 it has the effect of restricting the powers conferred by the earlier section we must give that effect to it. The important words for the present purposes are, "with respect (where the local authority have not the control of the streets) to the breaking up of streets for the purpose of laying pipes." The clauses of the *Waterworks Clauses Act*, 1847, referred to in these words are sects. 28 to 34. These sections are

(1) 3 Q. B. D. 376; 4 Q. B. D. 104.
(2) [1891] 2 Q. B. 216.
(3) 4 Ch. D. 407.
(4) 17 Q. B. D. 30.

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framed on the assumption that the "undertakers" (as they are termed) have not the control or management of the streets, and accordingly certain provisions are made for notice being given to the persons having such control or management and for payment of penalties to such persons in case of non-compliance with the provisions of the Act. What is the meaning of the words "where the local authority have not the control of the streets" in sect. 57 of the Act of 1875? Does it mean, have not the control of the particular street or streets in question in any case? Or are the words used in order to define the character or description of local authority to which the clauses are made applicable as one not having control of streets generally, or, in other words, not being a road authority? In my opinion, this is the crucial point for the decision of this case. I am of opinion that the latter is the true construction of the words, and that the meaning and intention of the section is to bring into operation, in the case of a local authority which is not itself the road or street authority, the obligation of doing the work under superintendence of the road authority, and the other restrictions in the *Waterworks Clauses Act*, and the correlative power of the road authority to superintend the execution of the work. If this be the correct interpretation of the statute, it follows that the portion of sect. 57 relied on does not apply to the *Wallasey* Local Board, which is an authority having the control of the streets, and their general power under sect. 54 is not curtailed or cut down by anything in sect. 57. It might be sufficient to say that I find a power given in plain words in sect. 54, and I do not think that the Plaintiff has shewn sufficient grounds for qualifying or restricting the exercise of the power thus plainly given. I am therefore of opinion that the judgment of the learned Judge should be discharged and the action dismissed. This is, of course, without prejudice to any claim of the Plaintiff for compensation under sect. 308, though it is not, in my opinion, necessary to express this in the order.

Solicitors: *Brook, Freeman, & Batley*, agents for *Wright, Becket & Co., Liverpool; Frith Needham*, agent for *W. Danger, Egremont.*

M. W.

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*Administration—Certificate of Debts—Res Judicata—Scotch Judgment—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *s.* 3.

*J. H. L.* died in April, 1892, resident and domiciled in *England*, but having a small amount of property in *Scotland*. He had borrowed money from *J. L.*, who was resident and domiciled in *Scotland*, the recovery of which was barred by the *Statute of Limitations* in *England*, but not in *Scotland*. In December, 1892, *J. L.* commenced proceedings in *Scotland* against the administratrix of *J. H. L.* to recover the money. On the 17th of January, 1893, a creditor commenced an action in *England* for the administration of *J. H. L.'s* estate, and an administration order was made on the 20th of January. On the 1st of February judgment was given against the administratrix in the Scotch action in her absence; but on the 14th she obtained leave to defend. On the 24th of March *J. L.* applied to prove his debt in the English action, and by his affidavit stated the pendency of the Scotch action. The Chief Clerk refused to adjourn the question till after the decision of the Scotch action, and on the 1st of May made his certificate disallowing *J. L.'s* claim. On the 30th of May *J. L.* recovered judgment in the Scotch action, and on the 22nd of July this judgment was registered in *England* under the *Judgments Extension Act*, 1868, s. 3. The administratrix applied for an injunction to restrain *J. L.* from enforcing his judgment, and an injunction was granted by *North*, J., who considered that *J. L.* was barred by the adjudication on his claim in Chambers:—

*Held*, on appeal, that the injunction ought only to have been granted on the terms of admitting *J. L.* as a creditor for the amount of the judgment debt and the costs of registration, for that under the *Judgments Extension Act*, 1868, s. 3, *J. L.* was in the same position as if on the day of registration he had recovered judgment for the amount in an English Court against the administratrix, in which case, the assets being still under the control of the Court undistributed, it would have been of course to allow him to prove for the amount of the judgment in the administration.

*JOHN HOUSTON LOW* died intestate and without issue in April, 1892, and letters of administration were granted to his widow, *Annie Low*. The intestate was of Scottish origin, but was resident and domiciled in *England*.

In November, 1882, and March, 1883, *John Low*, the father of *J. H. Low*, had made to him advances amounting to £270. *John Low* was resident and domiciled in *Scotland*.

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In December, 1892, the intestate, having some trifling property in *Scotland, John Low* applied for and obtained letters of arrestment *jurisdictionis fundandæ causâ*, and commenced a Scotch action against the administratrix to recover the above amount, and some further moneys, the claim to which was afterwards abandoned.

On the 17th of January, 1893, an action was commenced in *England* by a creditor for the administration of *J. H. Low's* estate, and on the 20th of January the common order for administration was made by consent.

On the 1st of February, 1893, judgment in the Scotch action was given against the administratrix in her absence. On the 14th she applied for and obtained leave to defend, and on the 21st the record was closed.

In the English action an advertisement for creditors had been issued, and on the 24th of March the solicitor for the administratrix gave *John Low* formal notice to come in and prove his claim. *John Low* accordingly filed an affidavit, stating the amount of his claim, and that an action in *Scotland* was pending to enforce it. The Defendant set up the *Statute of Limitations. John Low* asked the Chief Clerk to adjourn the consideration of the claim until the action had been disposed of. This the Chief Clerk refused to do, but adjourned the case for three weeks to give *John Low* time to file a further affidavit proving his claim. He did not file any further affidavit, and on the 1st of May the Chief Clerk made his certificate of debts, from which it appeared that there were only two claims—that of the Plaintiff for £11 7*s.* 6*d.*, which was allowed, and that of *John Low*, which was disallowed as being statute-barred. This certificate was filed on the 4th of May.

On the 30th of May *John Low* recovered judgment against the administratrix in the Scotch action for £270 and costs, her plea of the *Statute of Limitations* being overruled. On the 22nd of July *John Low* registered his Scotch judgment in the Queen's Bench Division under the *Judgments Extension Act*, 1868, s. 3 (1),

(1) 31 & 32 Vict. c. 54, s. 3: "On production to the Senior Master of the Court of Common Pleas at *Westminster*, or to the Master of the Court of Common Pleas at *Dublin*, of the certificate in one of the forms con-

and gave notice to the administratrix that unless the amount of the judgment debt was paid in three days he would proceed to issue execution.

On *ex parte* motion made on behalf of the administratrix the proceedings in the Queen's Bench Division were transferred to Mr. Justice *North*, to whose Court the administration action was attached, and an *interim* injunction granted to restrain *John Low* from proceeding to issue execution. The motion was brought on before Mr. Justice *North* on the 4th of August, 1893, on due notice to continue the injunction.

*Cozens-Hardy*, Q.C., and *Gatey*, for the administratrix:—

Where there is a duly constituted administration action a creditor can only recover by claim in the action. He will not be allowed to enforce a judgment.

The claim of the Scotch creditor has been adjudicated on in the administration action; he cannot go behind the decision of the Chief Clerk. The judgment in the Scotch action on a statute-barred debt cannot prevent the remedy in an English Court being barred by the *Statute of Limitations*.

tained in the schedule hereto annexed, as the case may be, of any extracted decreet of the Court of Session in *Scotland* which shall hereafter be obtained for the payment of any debt, damages, or expenses purporting to be signed by the Extractor of the Court of Session, or other officer duly authorized to make and subscribe extracts, or on production of the certificate of an extracted decreet of registration in the books of Council and Session purporting to be signed by the keeper of the register of deeds, bonds, protests, and other writs registered for execution in the books of Council and Session, which shall hereafter be obtained for the payment of any debt, damages, or expenses, such certificate shall be registered by such Master in a register to be kept in the Court of Common Pleas at *Westminster* and *Dublin* respectively for that purpose, and to be called 'The Register for Scotch Judgments,' and such certificate when so registered shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the decreet of which it is a certificate: . . ."

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*Swinfen Eady*, Q.C., and *F. Thompson*, for *John Low*:—

We are willing that instead of being allowed to issue execution we should prove for the amount of the judgment. The administratrix submitted to the jurisdiction of the Scotch Court; it is only fair that the creditor should be allowed the benefit of the judgment. In that action costs were incurred, unnecessarily if the administratrix can by means of this action defeat the claim. The Court will allow a claim after the certificate, if it is equitable to do so: *Brown* v. *Lake* (1).

The *Judgments Extension Act*, 1868, gives a Scotch judgment creditor an absolute right to enforce his judgment in *England*, as if it had been an English judgment. Had the creditor obtained judgment in *England*, the Court would have allowed him to prove.

North, J. (after stating the preliminary facts, continued):—

When the matter came before the Chief Clerk he was asked to allow it to stand over till the question in the Scotch action had been tried. The answer to the claim set up by the claimant was the *Statute of Limitations*, and it is admitted here to be quite clear now that the question is to be tried in the administration action. The advances were made under such circumstances that the *Statute of Limitations* is a clear defence which cannot possibly be got over. That being so, the defence was set up by the administratrix, and the question was whether the claim should stand over to find out what the Scotch law on the subject was. I cannot imagine why it should have stood over for any such purpose. The Chief Clerk declined to allow it to stand over till judgment was recovered. But he did not dispose of the matter summarily; he gave three weeks to the applicant to file any further evidence beyond the formal affidavit. The formal affidavit was displaced by the defence as to the statute, and it was necessary to have further evidence before the Chief Clerk could adjudicate upon the claim. But the applicant chose not to do anything further. He was content to let matters rest as they were so far as the administration suit was

(1) 1 De G. & Sm. 144.

concerned, and on the 1st of May the Chief Clerk made a certificate as to creditors in which the claim of the present claimant was disallowed. That certificate was allowed to stand; there has never been any application to vary it. Then in June this action came on in *Scotland.* I may say I know nothing about the way in which the jurisdiction arose or whether it could be disputed or not, it is sufficient to say that the administratrix did not put in any plea as to jurisdiction, and therefore the Court had jurisdiction to go on and decide the action. Judgment was given, not for £441, but for £270 and £39 for costs.

Thereupon the claimant who recovered judgment in *Scotland* proceeded to register the judgment in *England,* and having done so—ignoring the administration suit altogether—threatened to issue execution against the proceeds of the intestate's estate, which were in the hands of the administratrix in this country. I give him credit for this, that before doing so he gave notice stating that if they did not pay within three days he should issue execution. Thereupon he was asked to give an undertaking not to do so, or an *ex parte* application would have to be made to the Court. He declined to give that undertaking owing to circumstances which he is not to be blamed for. Then an application was made to me to restrain continuing proceedings in this country founded on registration in *England* of the Scotch judgment.

Now the question is whether this gentleman, who has recovered a judgment in *Scotland* after a certificate in which his claim is disallowed, is to be allowed to come in and prove in respect of this sum. In the first place it is to be observed that that is not what he sought to do, though it is what he says now he is willing to do, but it is not the case which he made. At first it was a claim to sweep away the assets, ignoring altogether the proceedings in the suit in *England.* Now, it is said that he is willing to come in and prove, but I may say that he has not applied to do so by making formal application—but that is his highest right, namely, to come in and prove. Is he entitled to do so? In my opinion he is not. The matter has been dealt with here

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and decided. Although no doubt the Court would allow him to come in if there was an equitable reason for allowing him to do so, I see no reason whatever why he should be allowed to re-open the proceedings which have been finished in this country, by which it has been adjudicated that he is not a creditor. What is the ground for saying he should do it? It is because since the claim has been adjudicated upon he has by proceedings which he took in *Scotland* obtained a better case than he could have had in the proceedings in *England*; but can he insist upon an adjudication in his favour by Scotch law where the very point to be decided in this case, and upon which his case was adjudicated upon, namely, the *Statute of Limitations*, cannot be raised? In my opinion he cannot be entitled to any such right, and I think the Chief Clerk was right in not postponing the proceedings until the Scotch action was tried. There was no dispute as to the facts. If there was a dispute as to the amount of the debt it might be different. It is conceded that the claimant has no case here as the statute applies. There is no equity shewn for letting him in to prove, and the judgment obtained since cannot do him any good.

For these reasons I think the proceeding under the judgment registered here is one that cannot have any effect given to it, and, therefore, the order which I made upon the *ex parte* application must be continued, but that is subject to this point. There was a proceeding in the action in *Scotland* which the administratrix defended, and the result was that a claim was established in *Scotland*, and £39 awarded for costs. That was the result of a proceeding by this claimant against the administratrix—both parties leaving it to Scotch law to decide that point, and as regards the costs of that proceeding which was taken by the common consent of the parties in that way it seems to me it is only fair to say that he has a good claim against the administratrix in respect of that sum, but it is a claim against the administratrix personally. I could not allow the assets in the hands of the administratrix to be seized for the purpose of paying those costs. I am prepared to do this; to direct that those costs should be paid in this proceeding to the claimant out

of the estate in the hands of the administratrix after satisfying the costs of the creditor who has proved, and the costs of the administration suit.

D. P.

*John Low* appealed from this decision. The appeal came on for hearing on the 1st of November, 1893.

*Swinfen Eady*, Q.C., and *F. Thompson*, for the appeal:—

If an injunction ought to have been granted at all, it ought only to have been on the terms of our being admitted to prove. The injunction restrains *John Low* from proceeding against the administratrix personally, and there is no equitable ground for such a restraint. There was no adjudication on the merits in the English action; so the defence that the matter was *res judicata* cannot be sustained. The Scotch judgment being registered has the same effect as an English judgment: *Judgments Extension Act*, 1868, s. 3, so the Appellant has an indisputable debt and ought not to be debarred from recovering it, which is the effect of the order appealed from. The assets are still under the control of the Court, and if this had been an English judgment proof upon it would have been of course.

*Cozens-Hardy*, Q.C., and *Gatey*, appeared for the administratrix; but the case was adjourned that it might be ascertained whether the Scotch judgment could be enforced in *Scotland* against the administratrix personally.

It was ascertained that the judgment was one which in *Scotland* operated only as a judgment against the Defendant as administratrix.

Nov. 15. *Cozens-Hardy*, Q.C., and *Gatey*, for the administratrix:—

We submit that in administering in *England* the assets of a person who died domiciled in *England* the English law must prevail.

[Lindley, L.J., expressed doubt as to this, and

[Davey, L.J., referred to *Phosphate Sewage Company* v. *Molleson* (1).]

(1) 1 App. Cas. 780.

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The same case in a further stage (1) supports the view of Mr. Justice *North* that this was *res judicata.* The Courts here could not restrain *John Low* from instituting proceedings in *Scotland,* for he has neither domicil nor property here: *Carron Iron Company* v. *Maclaren* (2). He has a Scotch judgment and should be left to enforce it as he best can in *Scotland.*

[DAVEY, L.J., referred to the *Judgments Extension Act,* 1868, s. 3.]

The Appellant has not a meritorious case. He takes advantage of the accident that the intestate had a trifling property in *Scotland* to bring an action to enforce a claim which could not be enforced in *England.*

*Swinfen Eady,* in reply:—

The administratrix has not a meritorious case. The Chancery action was a device of hers to get the benefit of the *Statute of Limitations,* of which she could not avail herself in *Scotland.* The Court has jurisdiction no doubt to grant an injunction; but it ought not to be granted except on the terms of *John Low* being allowed to prove. Where an administration order has been made the executor is entitled to have creditors' actions against him stayed; but if after the administration order he goes on defending one of the actions and fails, there is no authority which says that he can afterwards get an injunction.

1893. Nov. 27. LINDLEY, L.J.:—

The question raised by this appeal is whether *John Low,* who has obtained judgment in *Scotland* against the Defendant, as administratrix of her deceased husband, is entitled to be paid the amount of such judgment out of his assets, which are being administered in the Chancery Division of the High Court in this country.

The case is a very peculiar one, and dates are important.

*John Low,* who is the father of the deceased, lent him money on one or more I O U's. *John Low* lived in *Scotland.* The deceased lived in *England,* and died domiciled in *England,*

(1) 4 App. Cas. 801. (2) 5 H. L. C. 416.

having property both in *England* and in *Scotland*, but principally in *England*. The Defendant is his administratrix in *England*.

*John Low* could not enforce payment of his debt in *England*, being barred by the English *Statute of Limitations*. But he could enforce such payment in *Scotland*, his debt not being barred by lapse of time according to the law of that country. Accordingly, on the 15th of December, 1892, *John Low* brought an action in *Scotland* against the Defendant, as administratrix of her husband, and claimed over £400, and on the 1st of February, 1893, judgment was signed against her in her absence for this amount. She afterwards applied to the Scotch Court to set aside this judgment, and for leave to defend the Scotch action, and on the 14th of February, 1893, this application was granted. She then defended the action. By her pleadings she denied the debt, asserted that it was barred by lapse of time, denied assets sufficient to pay it, and relied on the fact that a judgment had been obtained in *England* for the administration of the estate of the deceased. *John Low* then reduced his claim to £270, and he recovered judgment against the Defendant for this amount, with costs, on the 30th of May, 1893. This judgment is in form for payment by her of £270, and by her as administratrix of the costs. But it has been ascertained, and is now conceded, that the judgment is only against the Defendant as administratrix, both as regards the principal sum and as regards the costs.

Immediately after proceedings had been thus commenced in *Scotland*—viz., on the 17th of January, 1893—one *Bland*, a creditor of the deceased, brought an action in this country against the Defendant for the administration of the estate, and on the 20th of January, 1893, the usual administration judgment was pronounced. In March, 1893, *John Low* sought to prove his debt in the administration action; but, the debt being barred, the Chief Clerk disallowed the claim, and he declined to allow the claim to stand over until the result of the Scotch proceedings should be known. He gave *John Low* further time to support his claim; but, being unable to take his case out of the statute, he filed no further evidence, and on the 1st of May, 1893, the Chief Clerk made a certificate disallowing the debt.

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No application has been made to vary this certificate. Meanwhile, the Scotch proceedings were going on. The parties to the English action might have applied to restrain *John Low*, the Plaintiff in the Scotch action, as in *Graham* v. *Maxwell* (1), from proceeding with his Scotch action, or they might have applied to restrain him from registering his judgment under 31 & 32 Vict. c. 54, s. 3, but no such application was made, and on the 22nd of July, 1893, he duly registered a proper certificate of his Scotch judgment under that Act. There was nothing wrong in this, and, whether he could or could not have been restrained from obtaining or from registering his Scotch judgment, whatever advantages the registration gives the judgment creditor he is entitled to. Having, however, threatened to issue execution against the assets of the deceased, the Defendant very properly applied for and obtained an injunction to restrain him (*i.e. John Low*) from carrying out his threats. But the injunction is so worded that it may prevent him from proving against the estate of the deceased in the administration action; and the judgment of Mr. Justice *North*, who granted the injunction, is in effect a decision that, although *John Low* has obtained and registered his Scotch judgment for £270 and costs, he is not entitled to prove in respect of this judgment in the administration action. Practically, therefore, it has been decided that *John Low* is not entitled to be paid his judgment debt out of the deceased's assets in *England*. No order on further consideration has yet been made. Those assets have not yet been distributed, and it is admitted that there are no unpaid creditors except *John Low* and the Plaintiff *Bland*, and that the English assets will probably be enough to pay them in full, or nearly so.

Under these circumstances the mere fact that the time for carrying in claims has expired is of no consequence. The assets being undistributed, and available for the payment of *John Low's* debt, it would be a matter of course to pay it, and, if necessary, to extend the time for proving it before the Chief Clerk, and for including it in his certificate, if the debt ought really to be paid out of the assets in this country.

(1) 1 Mac. & G. 71.

The question we have to determine is, whether *John Low* is entitled to prove his judgment debt in the administration action. Mr. Justice *North* decided against him, upon the ground that his claim was barred by the *Statute of Limitations* and was *res judicata.* I cannot concur in this view.

*John Low's* present claim is not based on his original cause of action, but on the registered Scotch judgment, which is a very different thing. The original cause of action is, no doubt, barred, and has been adjudicated upon in the English action; and the decision upon it was, moreover, quite correct. Nothing, therefore, would be gained by extending the time for a motion to vary the certificate of the Chief Clerk in disallowing *John Low's* claim as presented to him. But the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, gives a new cause of action, which is not barred by the *Statute of Limitations,* and which has not yet been adjudicated upon. Whether the Chief Clerk's certificate could have been pleaded in the Scotch action as *res judicata* I do not stop to inquire. It is quite plain it could not be so pleaded to an action in this country on the Scotch judgment now that it has been registered. The effect of the Scotch judgment, when registered under the Act 31 & 32 Vict. c. 54, is the same as that of an English judgment. The language of sect. 3 is very clear upon this point. The language is, that the certificate of the Scotch judgment, when registered, "shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered."

The judgment, therefore, must now be regarded as an English judgment. But the registration cannot wholly alter the nature and character of the judgment registered; and, if the Scotch judgment is only for a particular mode of applying Scotch assets, registration under the statute would not change its character and convert it into a judgment for the application of English assets in the same way. The object of the statute is simply to

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prevent the necessity of bringing several actions in *England, Scotland,* and *Ireland,* instead of one, in order to establish a right to be enforced anywhere within *Great Britain* and *Ireland.*

The Scotch judgment orders the Defendant to pay the Plaintiff £270 and costs out of the assets of the deceased. The Scotch Court cannot reach assets out of *Scotland*; but it can investigate and adjudicate upon claims against the estate of a deceased person whose legal personal representative is properly before the Court. This is what the Scotch Court has done. The Scotch judgment has established the Plaintiff's claim to the extent of £270, and has adjudicated him to be a creditor for that amount against the Defendant, as the legal personal representative of the deceased. The registration of this judgment under the statute converts the Plaintiff into an English judgment creditor for the same amount, to be paid by the Defendant as the legal personal representative, or, in other words, out of the personal assets of the deceased. If the Plaintiff had obtained an English judgment to this effect, he would clearly be entitled to prove in respect of it in the administration action. The judgment could not be disregarded on the ground that the action in which it had been obtained might have been restrained by injunction, and ought not to have been brought; nor would it be any answer to the judgment creditor, seeking to prove his debt, to say that the original cause of action was statute-barred or had been disallowed by the Chief Clerk, whose certificate had not been varied. The judgment would give a new cause of action, a new ground of claim, to the judgment creditor, and the judgment debtor could not dispute it, except by taking proceedings to impeach the judgment itself. So in the present case, unless the registration of the Scotch judgment can be set aside, and until it is set aside, *John Low* is entitled to the benefit of it. If the Defendant had allowed the first Scotch judgment of the 1st of February, 1893, obtained against her in her absence, to stand, that judgment could not have been registered in this country (31 & 32 Vict. c. 54, s. 8), and it would have been of very little use here: see *In re Boyse* (1). But, as already stated, the Defendant fought the case in *Scotland,* and omitted to apply

(1) 15 Ch. D. 591.

for an injunction to restrain the Scotch action or the registration in this country of the judgment ultimately recovered against her there. I am not aware of any principle on which *John Low* can now be deprived of the benefit of this registration. He is in the same position as if he had sued the Defendant in this country, and had not been stopped by injunction, and had obtained judgment against her in her representative capacity. In such a case, although execution would be stayed, the judgment creditor would be admitted to prove his debt in the administration action as a matter of course, so long as there were assets still undistributed and under the control of the Court in that action.

This decision is in no way opposed to *Phosphate Sewage Company* v. *Molleson* (1), for the decree in Chancery to which the Scotch Courts refused to give effect in preference to a prior decision of their own was not relied upon or treated as equivalent to a subsequent Scotch judgment. The case did not turn on the statute to which I have alluded and which governs the present case. The order appealed from must be varied by adding, "but the Appellant *John Low* is to be admitted in the administration action as a creditor for the amount of his judgment debt and the costs of registering the Scotch certificate."

The rest of the order appealed from will stand, as the Appellant had no right to enforce his judgment, as he threatened to do. He ought, however, to have the costs of the appeal, for he has succeeded in establishing his right to be paid his judgment debt, which the Defendant denied, and which the order appealed from prevented.

DAVEY, L.J.:—

I agree with the judgment read, and should not add anything were it not that we are differing from the judgment below.

In this case the real and substantial question which we have to decide is whether the Appellant is entitled to have a judgment which he has obtained in the Court of Session in *Scotland*, and which has been duly registered in accordance with the *Judgments Extension Act*, 1868, satisfied out of the assets of *John Houston*

(1) 4 App. Cas. 801.

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*Low*, deceased, in the hands of the Respondent, his administratrix.

The deceased was residing in *England* at the time of his death, and is stated to have been domiciled in *England*; but I do not understand that there has been any judicial determination on his domicil, nor do I think it in the least material. He died in 1892. The Respondent is his legal personal representative. On the 13th of December, 1892, the Appellant, who resides in *Scotland*, took out an arrestment in the Scotch Court *jurisdictionis fundandæ causâ*, and on the 15th of December commenced an action in that Court against the present Respondent as such legal personal representative, to recover a debt alleged to be due to him from the deceased. This was a proceeding which he was fully entitled by law to take. On the 1st of February, 1893, the Appellant obtained judgment against the Respondent *in absentiâ*. Now the Respondent might if she had chosen have left the Scotch proceedings severely alone. The judgment *in absentiâ* would, of course, have been effective against the Scotch assets, which are, however, stated to have been very small, but it could not have been registered under the *Judgments Extension Act*, 1868 (see sect. 8), and thereby acquired the force and effect of an English judgment, and it would at most have been *primâ facie* evidence of debt in an English Court: *In re Boyse* (1). But what did she do? She moved to discharge the judgment *in absentiâ*, and on the 14th of February an order was made by the Lord Ordinary recalling the interlocutor of the 1st of February, and admitting the Respondent to lodge defences. That was an obviously right order if the Defendant desired to contest the claim on the merits and suggested that she had a defence; but it was a course inconsistent, as it seems to me, with her present pretension to treat the Scotch action as a nullity. The Respondent put in answers to the condescendence and pleas in law, and in due course the parties went to trial on the pleadings, and the Court, after hearing counsel for the parties, repelled the pleas in law for the defender, and, apparently on some mutual admissions, gave judgment for the present Appellant for £270, with expenses. I assume, in accordance with an opinion of the learned Lord

(1) 15 Ch. D. 591.

Advocate, which has been obtained, that this is a judgment for payment by the Respondent as administratrix only, notwithstanding it is not so expressed. The Appellant has registered this judgment on the 22nd of July, 1893, and thereby it has by the statute acquired the force and effect of a judgment obtained in an English Court. In order to understand the reasons why it is alleged that the Appellant should not have the benefit of it, it is necessary to state the nature of the question between the parties and the proceedings taken by the Respondent in *England.* It does not seem to be denied, on the one hand, that deceased was at his death indebted to the Appellant on certain I O U's, nor, on the other hand, that any remedy for that debt in an English Court would be barred by the *Statute of Limitations.* In *Scotland* it has been held that there is no *Statute of Limitations* which bars the remedy in a Scotch Court. This really constitutes the singularity and difficulty of the case, which has been aggravated by the course taken by the parties. The Respondent, after the commencement of the Scotch action, got a small creditor for £11 (who appears to be the only other creditor on the estate) to commence an administration action in the Chancery Division, and on the 20th of January an administration order was made, and I think it was stated that the same solicitor appeared for plaintiff and defendant. There is no censure to be cast on the administratrix for taking this course. It is a recognised mode of placing the assets under the protection of the High Court. I only observe that this is not a case between the Appellant and the other creditors of the deceased, but it has been presented to us as exclusively a question between the Appellant and the administratrix. On the 24th of March, 1893, the Appellant filed an affidavit of debt in the English action, in which the pendency of the Scotch action was mentioned. The Chief Clerk, however, refused to let it stand over to abide the result of the Scotch action, but gave leave to file further evidence. No further affidavits were filed, and the Chief Clerk disallowed the claim, it being admitted that it was barred in an English Court by the *Statute of Limitations.* I pause here to observe that this was a submission by the Appellant to the jurisdiction of the English Court, and the administratrix might, if she had been so

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minded, thereupon have moved to restrain the Appellant from proceeding with his Scotch action: see *Graham* v. *Maxwell* (1). But I do not intend to express any opinion that she would have necessarily obtained an injunction for that purpose, even in a qualified form. However, she did not take that course. Nor did she make any application to restrain the Appellant, when he had recovered his judgment in the Scotch Court, from converting it into an English judgment by registration. She has permitted the judgment to be obtained and registered without objection. Has she any equity to deprive the Appellant of the fruits of it? On the 1st of May a certificate of debts was made disallowing the Appellant's claim and finding the Plaintiff the only creditor. The English action has not been heard on further consideration, and the estate remains undistributed in the hands of the administratrix, but subject to the control of the Court. In these circumstances the Appellant threatened to issue execution on his judgment. Now this was, in my opinion, wrong, and the order of the 4th of August, 1893, appealed from was therefore right, so far as it restrained him from issuing execution. I think, however, that it is too widely expressed; but the question is whether the learned Judge ought to have made the order without giving the Respondent liberty to carry in a proof on his registered judgment against her assets, notwithstanding the certificate. I am of opinion that such liberty should have been given. The Respondent's contention is that the matter is *res judicata*, and the Appellant is concluded by the certificate. Now, in the first place, I am of opinion that the certificate was quite right, but that all that was determined by it was that the Defendant was barred of his remedy in an English Court. There was no decision on the merits or existence of his claim. It is familiar law that a statute which bars the remedy without extinguishing the debt is part of the *lex fori* only, and mere matter of procedure in that particular Court: see *Harris* v. *Quine* (2). In the next place, this is not in fact the same claim as was disallowed by the Chief Clerk. This is a claim founded on a judgment which is a new cause of action. We are bound by the statute to give the judgment the same force and effect as if it had been obtained in

(1) 1 Mac. & G. 71. (2) Law Rep. 4 Q. B. 653.

an English Court. No attempt has been made, or, so far as I can see, can be made, to set aside the registration, and while the certificate exists effect ought to be given to it, and I can see no equity that the administratrix has to deprive the Appellant of his legal rights. This is not a case in which there is any competition between creditors, or in which the Appellant is seeking to obtain any priority by reason of his judgment over other creditors or to interfere with the equal distribution of the estate between creditors; but the question is exclusively between him and the administratrix, and but for the administration action there could be no question of his right to have his registered judgment satisfied out of the assets.

In the course of the argument a case of *Phosphate Sewage Company* v. *Molleson* (1) was referred to. The facts in that case have a superficial resemblance to the present case, but when closely examined are, in my opinion, substantially different. In the *Phosphate Sewage Case*, the House of Lords held that the Scotch Court, exercising an exclusive statutory jurisdiction in bankruptcy, had a discretion whether they would adjudicate on a claim against the bankrupt's estate at once, or would wait to inform themselves by the result of an English suit in which the claim against the bankrupt's estate was mixed up with that against several other defendants, and that the Scotch Court had rightly exercised such discretion in investigating and deciding the claim for themselves on its merits. This judgment of the Scotch Court on the merits in Scotch bankruptcy was the one relied on and upheld by the House of Lords as *res judicata* in the second case, and there was not and could not be in that case any judgment of the English Court capable of registration and acquiring the force and effect of an English judgment, for the simple reason that the English Court had no jurisdiction to decide a question of proof in a Scotch bankruptcy. I do not, therefore, think the case in the House of Lords is any binding or guiding authority to us in the case now before us.

I think that the injunction is too broad. It would restrain the Appellant from issuing execution against the Defendant personally, and I think that if he is entitled to do so he cannot

(1) 1 App. Cas. 780; 4 App. Cas. 801.

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be restrained from so doing. I also think that it should not extend to any assets there may be in *Scotland.* And, for the reasons I have stated, I think it should be prefaced by liberty being given to the Appellant, notwithstanding the certificate, and without disturbing any payment or any order which may have been already made for payment out of the estate (if any such has been made), to prove upon the certificate of registration of his judgment granted on the 22nd of July, 1893.

I much regret the waste of this small estate in the costs of these double proceedings, for which the Respondent and administratrix is responsible. As the Appellant was wrong, and the injunction was rightly granted, I think the order upon the Appellant for payment of the costs in the Court below should stand, but he should have his costs of the appeal from the Respondent, because I think that the injunction should only have been granted upon terms.

A. L. Smith, L.J., concurred.

Solicitors: *W. T. Wilkinson*; *Harrison & Powell*, agents for *C. H. Moordaff, Kington.*

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## *In re* DUKE OF CLEVELAND'S ESTATE. VISCOUNT WOLMER *v.* FORESTER.

[1892 C. 1284.]

*Rents—Outgoings.*

A testator devised estates to uses in settlement, and bequeathed to the person who should at his death become entitled to possession, all arrears of rent which might be due to his estate at his death, and all proportions to become due to his estate after his death, of rents accruing due at but payable after his death, "but so, nevertheless, that all outgoings of the said hereditaments properly chargeable against such arrears and proportions, and not discharged in my lifetime, shall be paid out of such arrears and proportions":—

*Held*, by *Kekewich*, J., that the outgoings chargeable against the arrears and proportions of rents included only rates, taxes, tithes, tithe-rent charge and other outgoings (if any), which were recoverable by process of law as against or in respect of the hereditaments out of which such rents

had been derived, and did not include agent's salary, or the costs of any repairs or improvements, or wages of workmen employed on the estates, notwithstanding that it might have been the practice of the testator to debit the same to the particular parts of the estates in respect of which such expenditure was incurred:

*Held*, on appeal, that the outgoings properly chargeable against the arrears and proportions of rent included all such expenses due and remaining unpaid at the testator's death, as in the ordinary course of management as carried on by him, would, at his death, come into charge against such arrears and proportions.

THIS was an appeal of Colonel *Hay*, as interested in the residuary estate of the late Duke of *Cleveland*, from a decision of Mr. Justice *Kekewich*.

The Duke, by his will dated the 22nd of July, 1891, after appointing Viscount *Wolmer* and *F. G. H. Price* executors and trustees, devised his *Raby* estates to the use of his trustees in fee, upon trust, that in case within five years from his death any person should establish his title to the barony of *Barnard* (the only title held by the Duke which would not lapse on his death) or should otherwise acquire the title of Baron *Barnard*, the trustees should settle the *Raby* estate so as to go with the barony, but so that any Baron *Barnard* born in the testator's lifetime should only be tenant for life. He declared that the first tenant for life of the *Raby* estates when ascertained should be deemed to have been in possession from the testator's death. He directed his trustees to manage the *Raby* estates till the person entitled to possession should be ascertained, and directed that all accumulations of rent should belong to the person so ascertained. He authorized them to continue to employ all agents, workmen, servants, gardeners, and other persons who might be employed on the *Raby* estates at his decease, or to employ others, and to pay all salaries and wages out of the rents.

The testator then devised all the manors, advowsons, messuages, lands and hereditaments in the county of *Somerset* which at his death he should be entitled to or have power to dispose of for an estate in fee simple, legal or equitable, and also the *Battle Abbey* estates, subject to the life interest therein thereinbefore limited to his wife and from and after the determination thereof, to the uses thereinafter declared, that was to say, to the use of

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his great nephew *Francis William Forester* during his life, with remainder to the use of his first and other sons successively according to seniority in tale male, with remainder to the uses thereinafter declared concerning *Ashton Keynes'* estates. The will contained the following clause: "I bequeath to each person who at my death or as from my death shall become entitled to the possession or to the receipt of the rents and profits of any hereditaments hereinbefore devised, all arrears which at my death may be due to my estate of rents and profits arising from the same hereditaments, and also all proportions to become due to my estate after my death of rents and profits accruing due at but payable after my death, but so nevertheless that all outgoings of the said hereditaments properly chargeable against such arrears and proportions and not discharged in my lifetime shall be paid out of such arrears and proportions."

The testator gave his residuary real and personal estate to his trustees, upon trust to convert it and pay out of the proceeds his funeral and testamentary expenses, and debts, and legacies, and invest the ultimate residue, and pay the income of one moiety to the Appellant for life. He empowered his trustees to let the residuary real estate until conversion, and directed that the rents "after payment thereout of all rates, taxes, costs of insurance, and repairs, and other outgoings," should be paid to the persons entitled to the income of the invested fund.

The testator died on the 21st of August, 1891, and his will was proved on the 24th of November, 1891.

The estates devised to Captain *Forester* for life consisted of house-property, known as the *Bathwick* estate, and of an agricultural estate called the *Wrington* estate. These estates were managed by the same agent, who attended to the repairs and the employment of workmen for the exclusive purpose of keeping the estates in repair.

The agent was paid, in the case of the *Bathwick* estate, by a commission or poundage, and in respect of the *Wrington* estate by a salary.

The agent, in regard to properties requiring repairs, sometimes employed builders or other tradesmen to do the repairs,

and sometimes obtained the necessary materials, and employed the staff of workmen engaged on the estate.

The practice in regard to these two estates was as follows:—

The agent retained in hand out of the rents what he considered to be a sufficient amount to pay rates, taxes, tithes, and his commission or poundage in respect of the *Bathwick* estate, and also his salary in respect of the *Wrington* estate, and what he thought might be required for repairs, and for wages of workmen employed to do repairs. The agent then from time to time remitted to the Duke what he considered unnecessary to retain, but without any account. The agent annually sent an account to the Duke, with a cheque to balance such account.

The agent paid, in reference to both estates, for all repairs and works done by the landlord, including architect's fees, out of the rents, remitting the balance to the Duke.

The only occasions on which the Duke remitted money to the agent for works were as follows. In 1880 he remitted him £1000 to build new cottages on the *Wrington* estate. About 1886 he remitted him money to build forty new cottages on the *Bathwick* estate. He also sent him money for building a mission house on the same estate, and in 1889 he sanctioned a contract for building a set of model lodging-houses for working people on the same estate, at the cost of £6573 17*s.* 5*d.* The work was nearly finished at the Duke's death, and he had remitted personally for the purpose sums amounting to £5416 19*s.* 6*d.*, leaving a balance of £1156 17*s.* 11*d.*, which the executors, after his death, paid without prejudice. This was the subject of head 6, in the originating summons next mentioned.

The repairs on the *Bathwick* estate were sometimes of an expensive character. Where the tenancies determined, the houses had to be put into thorough repair; this was sometimes done by agreement with a new tenant, who insisted on the repairs being done before he took the house, and sometimes were done without reference to any particular tenant.

On the 4th of April, 1892, the trustees of the will took out an originating summons against Captain *Forester* to have it determined.

"What, according to the due construction of the said will,

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are the outgoings of the estates devised by the said will to the Defendant during his life, properly chargeable against the arrears and proportions of rents by the said will bequeathed to the said Defendant, and which outgoings were not discharged in the lifetime of the said Duke of *Cleveland*, and in particular with reference to—

"First. Rates, taxes, tithes, and agent's salary.

"Secondly. Repairs commenced and completed before the Duke's death.

"Thirdly. Repairs commenced before, but not completed at the Duke's death, and for the execution of which an agreement had been entered into with a new tenant, and a date for completion either had or had not been fixed.

"Fourthly. Repairs commenced before the Duke's death, and not completed at his death, and for which there had been no contract with any tenant.

"Fifthly. Ordinary repairs from time to time carried on upon the said hereditaments.

"Sixthly. Repairs for which a contract with a builder had been entered into by the Duke.

"Seventhly. Wages of workmen employed on the said estates."

The summons was heard by Mr. Justice *Kekewich*, who, on the 10th of August, 1892, pronounced an order containing the following declaration:—

"Declare that according to the true construction of the said will, the outgoings of the estates thereby devised to the said Defendant *Francis William Forester* during his life, properly chargeable against the arrears and proportions of rents by the said will bequeathed to the said Defendant, include only rates, taxes, tithes, tithe rent-charge, and other outgoings (if any) which are recoverable by process of law, as against or in respect of the hereditaments out of which such rents have been derived, and that in particular such outgoings do not include agent's salary or the cost of any repairs or improvements, or wages of workmen employed on the estates, notwithstanding that it may have been the practice of the testator to debit the same to the particular parts of the estates in respect of which such expenditure was incurred."

By order dated the 26th of June, 1893, Captain *Hay* was added as a party Defendant to represent the residuary estate, and liberty was given to him to attend upon the settling and passing of the above order, which had not yet been settled.

Captain *Hay* then, by leave, appealed from the order of the 10th of August, 1892, seeking to have it declared that the outgoings included not only the outgoings allowed by the order, but also the agent's salary and the expenses of the several matters thirdly, fourthly, fifthly, sixthly, and seventhly mentioned in the summons, so far as they had not been discharged by the Duke in his lifetime.

The appeal came into the paper on the 4th of November, but was directed to stand over, that notice might be given to Lord *Barnard*, who had established his title to the barony, and was in possession of the *Raby* estates, to which, as well as to the *Somersetshire* estates, the clause as to outgoings applied.

The appeal was heard on the 21st and 22nd of November, 1893.

*Cozens-Hardy*, Q.C., and *Ashworth James*, for the appeal:—

The object of the testator manifestly was to hand over his estates to the devisees as going concerns, giving them whatever in the way of rent was coming to him out of the estate, but had not been paid, but making it primarily liable to whatever he in his ordinary course of management would have paid out of it. There is nothing to satisfy the strict words of Mr. Justice *Kekewich's* declaration, for none of the outgoings which he has allowed were recoverable by process of law as against or in respect of the rents. It is necessary, therefore, to give a reasonable meaning to the words. We say, therefore, that salaries, wages, and repairs are included.

*Warmington*, Q.C., and *Druce*, for Captain *Forester*, and *Buckley*, Q.C., and *Ingle Joyce*, for Lord *Barnard*:—

The testator must be understood to have meant outgoings which could in some way be recovered out of, or were in some way chargeable on, the land, such deductions from rent as are generally made or allowed. Repairs are in no sense an outgoing chargeable against rent, and the testator cannot have intended to make the tenants for life pay an arrear of repairs arising before the period covered by the rents which they are to receive. The sums which Mr. Justice *Kekewich* has allowed

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against the rents are all that ought to be allowed. The other sums are debts of the testator, and there is nothing to take them out of the direction for payment of debts out of the residuary estate.

*E. Beaumont*, for the Plaintiffs.

*Cozens-Hardy*, in reply.

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My learned Brothers will deliver judgments, which I have read, and with which I concur. The Lord Justice *Davey* has drawn a form of order, which has been settled with great care.

A. L. SMITH, L.J.:—

The question in this case arises upon a clause in the will of the late Duke of *Cleveland*, who died on the 21st of August, 1891, having made his will shortly before that date.

At the time of his death the Duke was possessed of large landed estates, which may be called the *Somersetshire* estates, the *Raby Castle* estates, and the *Ashton Keynes* estates. These different properties had their respective agents, who received the rents accruing therefrom, and retained in hand that which each considered sufficient to pay rates, taxes, tithes, his commission or salary, as the case might be, and what he thought would be required for repairs and wages, the details of which are set forth with particularity in a statement of facts agreed upon between the parties. From time to time these agents remitted to the Duke what money they considered it unnecessary to retain, without any accounts, but they annually sent him an account with a cheque to balance it. In this way these estates had for years been managed, and were being managed at the time when the Duke made his will.

The question immediately before the Court relates solely to the *Somersetshire* estates, to which Captain *Forester* became entitled under the will of the Duke, though Lord *Barnard*, who has proved his title to the *Raby Castle* estates, was represented by counsel before us, for the construction of the clause in question

affects him as well as the tenants for life of the other estates. [His Lordship read the clause giving the arrears of rents and proportions of rents, with the directions as to outgoings.]

It will be seen that this clause first deals with what the Duke was about to give to the tenants for life who were coming into their respective estates. It then deals with the obligations he imposes upon them in consideration of the gifts he was about to make. The clause when applied to the facts reads:—"I bequeath to Captain *Forester*, who becomes entitled to my *Somersetshire* estates, all arrears of rents and profits arising from such estates, which may be due at my death, and also all proportions of such rents and profits accruing due at the date of my death, though not payable till after."

Now, stopping here, it is manifest that the Duke was desirous of bestowing upon the tenants for life, who were coming into their respective estates, something which, unless specifically bequeathed to them, they would not have taken. Having made this bequest in their favour, he then proceeds to place an obligation upon them—viz., that they should discharge out of what they would receive under this bequest certain outgoings, and what these are is the question in this case. The clause then proceeds: "But so, nevertheless, that all outgoings of the said hereditaments (*i.e.*, of each of the three estates respectively) properly chargeable against such arrears and proportions, and not discharged in my lifetime, shall be paid out of such arrears and proportions."

Now, one thing is clear, viz., that the tenants for life were not in any case to be called upon to pay more than they received, and it seems to me that, in order to ascertain what the amounts are which each tenant for life received under the bequest, the rents will have to be apportioned. It was only out of what each received that the outgoings were to be paid. If the outgoings properly chargeable against the arrears and proportions of arrears amounted to more than the amount of the arrears and proportions to be received, then the Duke's residuary estate had to bear this excess; if they amounted up to or to less than the amount to be received, the tenants for life had to bear them.

Mr. Justice *Kekewich* has held that the only outgoings as

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regards the *Somersetshire* estates which Captain *Forester* is to bear, are those recoverable by process of law as against or in respect of the hereditaments out of which the rents have been derived, and he enumerates them as being rates, taxes, tithe, tithe-rent charge, and other outgoings. I asked during the argument what it was which was recoverable by process of law against arrears or proportions of arrears of rent, and it had to be admitted that there was no such thing. It appears to me that there is also no such thing as an outgoing chargeable against arrears or proportions of arrears of rent, and consequently to make the clause read some words must be understood as being in it. I read the words "All outgoings . . . properly chargeable against such arrears" as meaning, "All outgoings properly chargeable in account against such arrears." This makes sense of the clause and makes it intelligible, which it is not without; and when I bear in mind the manner in which these estates had been and were managed to the knowledge of the Duke when he made his will (and this is legitimate evidence when construing the will), I cannot doubt that this is the true reading of this clause. It will be noticed that the outgoings to be paid by the tenants for life are to be those not discharged by the Duke in his lifetime. What are they? It seems to me those which the agents were charging the Duke with in the ordinary management of the estates, and which in account were set off against the rents received. The Duke, by this will, bequeathed to the tenants for life the unreceived income of the respective estates to which they were about to succeed, subject to those burdens which had then been incurred in the ordinary and accustomed management of the estates, and which, when he died, he had not discharged, so that each tenant for life was to enter into possession of his estate as a going concern. I should point out that they will not receive the balances in the agents' hands, for they are not "arrears of rent," but had been received at the date of the Duke's death. I can find in the will no indication that the Duke intended to make his residuary estate bear all the accruing burdens, excepting rates, taxes, and tithes, of these three great landed properties, as held by Mr. Justice *Kekewich*; but on the contrary, I find him depriving his residuary estate of that income out of which these

burdens would ordinarily be defrayed. In my judgment, besides rates, taxes, tithes, and tithe-rent charges due at the Duke's death, agent's remuneration, whether paid by way of commission or salary due at the Duke's death, also wages of workmen due at that date also, the cost of repairs which were incident to the proper management of the *Somersetshire* estates as carried on by the Duke in his lifetime, and due at the date of his death, and which are set forth in the statement of facts herein, are chargeable against and must be borne by Captain *Forester* up to the limit of his receipts, and not by Colonel *Hay* out of the residue. Those commissions, salaries, wages, and cost of repairs which were not due and payable at the death of the Duke, though partially earned, and for which Captain *Forester* has not rendered himself personally liable, in my opinion, the executors must pay when they become due, and consequently these fall upon the residue. I am aware that there is a clause in the will which couples "outgoings" with the words "insurance and repairs," and also a clause referring to *Raby Castle*; but to my mind, without these clauses the clause in dispute is to be read as I read it.

The point that in the residuary bequest it is provided that the Duke's debts were to be paid thereout, does not affect my view of the clause in question.

If the outgoings properly chargeable in account against the arrears and proportions of rent exceed the rent received, then such outgoings will be a debt of the Duke's which his residuary estate must bear, and is, therefore, provided for by that bequest, but until such time, in my judgment they are not debts of the Duke within the meaning of the will, but are liabilities to be borne by the tenants for life.

For these reasons I think that this appeal should be allowed.

Davey, L.J.:—

Reading this clause through without dwelling on the details of the language used, one's impression is that the general intention of the testator was to exclude the *Apportionment Act* and to let the devisees into possession of the estates devised to them, including any arrears of rent that might be due, as at his death,

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but subject to the burden of the liabilities then affecting the ownership of the estates. And this we think was the general intention. If we turn now to the particular language employed, it no doubt presents difficulties of construction, but, in our opinion, according to its true construction it carries out what I have described as the general impression and scope of the clause reading it as a whole. We think that "all arrears which may be due to my estate," is confined to rents due from tenants; and indeed, the learned counsel who argued this case on behalf of the Respondents, disclaimed any intention of claiming the balances in the hands of the testator's agents at the time of his death. The next question is, what is meant by the expression "all outgoings of the said hereditaments properly chargeable against such arrears and proportions and not discharged in my lifetime," which the testator directs to be paid "out of such arrears and proportions"? The learned Judge has construed these words as confined to "rates, taxes, tithes, tithe-rent charge, and other outgoings (if any), which are recoverable by process of law as against or in respect of the hereditaments out of which such rents have been derived." And if we may interpret his order by his reasons for it, he thinks that outgoings mean those outgoings "which, in point of law, are attached to the hereditaments." And by "properly chargeable against," &c., he understands only "such deductions from rent as are generally made or allowed." In our opinion this construction is too narrow. Rates and taxes are usually paid by the tenant, and in some cases deducted from the rent before payment; and as to these, no question could arise. If paid by the landlord, they are a debt due from him, and are not, in that case, deducted from or charged by law against the rent. The same may be said of tithe-rent charge when not paid by the tenant. Previous to the recent Act, which came into operation a few months only before the testator's death, tithe-rent charge could only be recovered by distress. We think it is permissible to look at other clauses of the will in which the same expression occurs, and we find that the testator, in the clause relating to management during minority, uses the expression "rates, taxes, costs of insurance and repairs, and other outgoings." We are of opinion that the expression "outgoings of

the hereditaments" in the clause under consideration, ought to be construed in the larger and popular sense as including every expense relating to the estate which, in the ordinary course of management, would require to be made in order to maintain the estate in a fit state to earn rent, or would be a proper deduction before ascertaining the net rent receivable as income. We think also, that it is competent for the Court in construing the will to have regard to the testator's mode of management. The result is that in our opinion all such expenses remaining unpaid at the testator's death, as in the ordinary course of management as carried on by the testator would come into charge against the rents due or accruing due at the time of the death, treating each estate as a whole, will have to be deducted. If they exceed the amount of the arrears and proportions, of course the excess will fall upon the Duke's general estate as a debt. This will, in our opinion, include the items numbered 1, 2, 5, and 7 in the summons. With regard to the third, fourth, and sixth items, we think the amount due in respect of the work done at the time of the Duke's death should come into the account of expenses to be deducted. A distinction has been drawn in argument and in the statement of facts laid before the Court by the trustees between ordinary and extraordinary repairs, and we have felt some doubt whether the expenses of the latter ought to be deducted. But, on consideration, we think that no distinction between the expenses of the two classes of repairs can be made. They are equally expenditure for the purpose of putting the estate in a condition to earn rent, and we may remark that, in each case, the tenant for life gets the benefit of the expenditure, and in no case can be out of pocket for the cost of them. We are therefore of opinion, that the expenditure on so-called extraordinary repairs, so far as incurred in the Duke's lifetime, and being due in accordance with the contracts under which they are made and unpaid at the time of his death, ought to be deducted. If, in accordance with the contracts made by the testator, the cost of repairs, whether partially completed in his lifetime or not, would not be payable until after his death, we think that such expenditure would not form the proper subject of deduction under the language of this clause.

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With regard to the *Raby* estate we have no statement of facts before us. We do not know whether any difficulty will arise in applying what we have held to be the proper construction of the clause.

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Discharge Mr. Justice *Kekewich's* order except the direction for payment of costs.

Declare that according to the true construction of the will, the tenants for life of the several estates devised by the will in settlement, are respectively entitled to the arrears of rent remaining due from the tenants at the time of the testator's death, and the rents accruing due at that date, without any apportionment in favour of the testator's estate, and that the outgoings of the devised hereditaments properly chargeable against such arrears and proportions include all such expenses due and remaining unpaid at the time of the testator's death, as in the ordinary course of management as carried on by the testator would at the time of his death come into charge against such arrears and proportions of rents accruing due at the time of his death, treating each estate as a whole.

Declare that the first, second, fifth and seventh items in the summons ought to be deducted from the arrears and proportions of rent of the estate devised to Defendant *F. W. Forester*, and so much of the third, fourth and sixth items as, in accordance with the contracts under which the repairs therein mentioned were executed, was due and owing at or prior to his death, and then remained unpaid, ought also to be deducted; but so much thereof as was not in accordance with such contracts payable until after his death ought not to be deducted.

Solicitors for Appellant: *Williams & James.*
Solicitors for Captain *Forester*: *Dawson, Bennett, & Dawson.*
Solicitors for Plaintiffs: *Jennings & Finch.*
Solicitors for Lord *Barnard*: *Trower, Freeling, & Parkin.*

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## *In re* BAGOT'S SETTLEMENT. BAGOT *v.* KITTOE.

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[1893 B. 1036.]

*Settlement by way of Trust for Sale—Married Woman restrained from Anticipation—Equitable Tenant for Life—Possession—Discretion of Court—General Leave to exercise Powers of Tenant for Life—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 63—*Settled Land Act,* 1884 (47 *&* 48 *Vict. c.* 18), *s.* 7, *sub-s. ii.—Costs—Form of Order.*

The Court has a judicial discretion as to giving possession, upon proper terms, to an equitable tenant for life, and the *Settled Land Acts* afford additional ground for exercising this discretion in favour of the person having such extensive statutory powers.

A married woman, restrained from anticipation under a settlement by way of trust for sale, which conferred wide powers of management upon the trustees until sale, was held entitled, upon proper undertakings for the protection of the estate and the trustees being given, to be let into possession of the settled land, and to exercise all the powers conferred by the Acts on a tenant for life, except the power of sale and exchange; but as no complaint was made against the conduct of the trustees she was directed to pay the costs of the application.

## ADJOURNED SUMMONS.

This was an application by the Plaintiff, *Frances Anna Mary Bagot,* a married woman, restrained from anticipation under a settlement by way of trust for sale, asking to be let into possession, or receipt of the rents and profits, of the settled estates, and also asking for general leave to exercise the statutory powers of a tenant for life.

The facts, so far as material for the purposes of this report, were as follows:—

By a settlement of the 3rd of February, 1890, made on the marriage of the Plaintiff, certain real estates in the counties of *Lancaster, Warwick, Dorset,* and *Stafford,* were conveyed unto and to the use of the Defendants (the trustees of the settlement), their heirs and assigns, subject to a then subsisting legal rent-charge for £1500 in favour of the Plaintiff's mother, upon trust for sale, with full power to postpone, and to pay the income arising from the investments of such proceeds of sale, or the

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rents and profits until sale, to the Plaintiff for her life, for her separate use, without power of anticipation, and after her decease, upon certain further trusts for the benefit of her husband for life, and the issue of the marriage, or for certain other persons in default of issue. The settlement gave the trustees very extensive powers of management, amongst others, to cut timber, open and work mines, and grant mining leases for ninety-nine years. The trustees had exercised their powers, and had managed the estates up to the time of the present application, the costs of management being at the rate of about £4 or £5 per cent. on the gross rental.

The gross rental was about £5000, and was derived partly from agricultural rents, and partly from rents and royalties receivable from mines and mineral properties in *Lancashire.*

The trustees did not contemplate exercising the trust for sale for some time to come, though they declined to bind themselves to postpone the sale for any definite period. One of the trustees was the vicar of *Sutton Coldfield, Warwickshire,* another was a solicitor at *Birmingham,* and the third was head master of a school at *Highgate*; and though no complaint was made by the Plaintiff against the conduct of the trustees in their previous management of the estates, yet her contention was, that she could manage the estates at less expense to herself, if she were let into possession.

The Plaintiff now applied by originating summons that the Defendants, the trustees, might be ordered to let her into possession, or receipt of the rents, issues, and profits, of all and sundry the lands and premises comprised in the settlement; and that leave might be given her to exercise all the powers conferred on her, as tenant for life under the said settlement, by the 63rd section of the *Settled Land Act,* 1882, or by that section in combination with any other enactment contained in the *Settled Land Acts,* 1882 to 1890, except the powers of sale and exchange.

The Plaintiff was about twenty-four years of age, and at present there was no issue of the marriage; the husband was about thirty years of age. Neither the husband, nor the Plaintiff's mother, the annuitant, were parties to, or served with, this application.

*Levett*, Q.C., and *W. C. Druce*, for the Plaintiff, Mrs. *Bagot*:—

The right of an equitable tenant for life to be put in possession, or receipt of the rents and profits, of the settled estates was fully argued and decided in *In re Wythes* (1); the principle of that decision, on which we rely, is equally applicable to the case of a person "deemed to be tenant for life" under the *Settled Land Act*, 1882, s. 63. And the fact that the tenant for life in this case is a married woman makes no difference: *In re Bentley* (2). We are quite willing to give proper undertakings for the reasonable protection of the trustees and the property, similar to the undertakings in *In re Wythes*.

Then, pursuant to sect. 7 of the *Settled Land Act*, 1884, we ask that the Plaintiff may be authorized to exercise all the statutory powers conferred on a tenant for life, except the power of sale and exchange.

*Byrne*, Q.C., and *W. D. Rawlins*, for the Defendants the trustees:—

The proposition amounts to giving a young married lady of twenty-four the entire management of these large estates, to the exclusion of the trustees, against whom no complaint is made, and in a case where the settlement has expressly provided that the trustees are to manage the estates. The question of inconvenience too is a serious objection: there will have to be another application to restore possession to the trustees whenever they propose to exercise their power of sale. The Plaintiff cannot claim to be let into possession as of right; it is a question for the discretion of the Court: *Taylor* v. *Taylor* (3). If a married woman is let into possession it is equivalent to letting her husband into possession, and the protection intended for her by the settlement is diminished; that was one of the grounds for the decision in *Tidd* v. *Lister* (4). It never used to be the practice of the Court to let a married woman, tenant for life, into possession.

[CHITTY, J.:—I remember a case, in which I myself was engaged, in which Sir *G. Jessel*, M.R., let a married woman into

(1) [1893] 2 Ch. 369.
(2) 54 L. J. (Ch.) 782.
(3) Law Rep. 20 Eq. 297.
(4) 5 Madd. 429.

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possession of settled estates, much to the astonishment of the learned solicitor who had carefully prepared the settlement with a view to exclude the husband.]

That must have been on special grounds; there is no reported case where such a thing has been done. We contend that the *Settled Land Act* has not abrogated the old authorities of which *Tidd* v. *Lister* (1) may be taken as a type, in the way stated in the judgment in *In re Wythes* (2).

Then there is the rent charge of £1500 a year to be paid, and the annuitant is not a party to this application.

To apply for leave to exercise all the statutory powers generally, without specifying any instances, or giving any reasons, is unusual.

*Levett*, in reply:—

We put our application, as one for the discretion of the Court, not as a matter of right. The question of convenience is entirely on the side of the Plaintiff. Here you have three trustees, living in different parts of the country, all with business of their own to attend to, whereas the Plaintiff will be living on the spot, and can manage the estates much more economically than the trustees can. We can make the husband a party and let any undertakings required by the Court be given by the Plaintiff and her husband.

CHITTY, J. (after stating the nature of the application, and the facts, and observing that no complaint was made by the Plaintiff against her trustees, except that none of them were residing within easy reach of the property, continued):—

Now, the application is addressed to the judicial discretion of the Court; and this discretion has to be exercised on reasonable grounds, the Court looking to the convenience of the parties; to the question of expense, which falls of course on the tenant for life; and to other circumstances of a like kind. It is clear that Mrs. *Bagot* has no right to claim to be let into possession; and she can only claim to be let into possession through the

(1) 5 Madd. 429. (2) [1893] 2 Ch. 374.

exercise of the judicial discretion. In saying this, I found the proposition upon a well-known series of authorities. In addition to those that were referred to at the Bar, there is a decision, which I perfectly well remember, of the late Master of the Rolls, where a lady somewhat advanced in years married a clergyman much younger than herself, and, with a view to afford the lady complete protection, a stringent settlement was prepared and executed, under which extensive powers of management were conferred upon the trustees, against whom nothing was to be said. One was a solicitor, and I think he was entitled, as the solicitor is in this case by the instrument itself, to charge for his professional services. In that case nothing, however, turned upon that point, nor does anything turn upon the similar point in the case before me. The case is identical with the present, with one exception, and that is that there was no trust for sale. There were the usual powers of sale and exchange, but no trust; and that case occurred before the passing of the *Settled Land Acts*. The trustees were not willing to give up possession to the tenant for life, for such, in substance, the lady was, although she had no right to possession on the principle I have already explained; and the Master of the Rolls, after considering the authorities on the subject, let the lady into possession. It was pointed out that that was, in substance, in all probability, letting the husband into possession; but that argument did not avail. The order was guarded by proper undertakings, which the husband was willing to give.

Now, in the exercise of the judicial discretion, the circumstances of one case, and the decision in a particular case, do not, of course, preclude the Judge from exercising his discretion in another case, though it is always of some assistance to see how the judicial discretion has been previously exercised by other judges. I have mentioned the case, because it is, with the one exception which I have mentioned, identical with the present.

Now, with regard to the trust for sale, there would unquestionably have been a material difference if the trustees desired now to exercise that trust; but, coupling the trust for sale with the power to postpone, and the power to postpone being duly exercised, according to their discretion, by the trustees at present,

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the result is, that that trust for sale makes no material difference in the cases; because any order letting the Applicant into possession will be, not final for her life, but until further order; so that possession can be recalled at any time when it would be proper to restore the possession to the trustees.

Mr. *Byrne*, for the trustees, put forward an argument as to the inconvenience of frequently changing the possession, an argument which would be worthy of consideration, and would be entitled to some weight, if it had special application to the circumstances of the case. It would be, in my opinion, an idle thing to let Mrs. *Bagot* into possession now, if, for reasons which I could judicially notice, there was a probability that within a very short time it would be right to restore the possession to the trustees. But, on the facts of the case, I am unable to discover any particular circumstance which would shew that it would be necessary to restore the possession to the trustees at any particular time.

Now, unquestionably, on the point of convenience, it is convenient that the lady and her husband, to the extent which she may desire to obtain his assistance, should have the management of the property, the income of which she is entitled to receive, and that she should get that income with as little expense in the way of commission for collecting rents, employment of agents, and the like, as is practicable under the circumstances. The balance of convenience is in her favour. She has a direct interest in reducing the expenses to the lowest practicable limit.

Therefore, if I were dealing with this case, quite apart from the *Settled Land Act*, I should consider it a proper exercise of my discretion to let the lady into possession. I am not disposed myself to say that the *Settled Land Acts* have abrogated the old cases. It really appears to me that the proper expression with regard to the *Settled Land Acts* with reference to the doctrine which I am considering is, that the *Settled Land Acts* afford an additional ground for exercising the discretion favourably to the person who has conferred upon her or him, as tenant for life, by the *Settled Land Acts*, the extensive powers therein contained—powers which are expressly conferred upon a married woman though she is restrained from anticipation.

[illegible] *Settled Land Acts* into consideration, I think that [illegible] stronger. The trustees in this case have done [illegible] for any suggestion from them with regard to [illegible] given by the lady, or her husband, as to the keep[illegible] [illegible]ings and any charges on the estate, or the like; b[illegible] [illegible]ot at present suggested anything to me on that head. [illegible] should be any undertakings particularly asked for, I will take care to insert what is proper for the protection of all interested in the estate in the order which I make.

The only ground that I think I need notice, upon which the application is resisted by the trustees, is, that the lady was only twenty-four years of age, and her husband was thirty; but I cannot find in the ages of the lady and her husband any sufficient ground for refusing to let her into possession or receipt of the rents.

A point was made, but really not pressed, that a person entitled to a rent-charge was not a party, and I mention this circumstance to avoid any misconception. The trustees, as it appears, are not trustees for that absent person. She has a rent-charge of, I think, £1500 a year; but it is a legal rent-charge, with a power of distress, and it is paramount to the trust estate of the trustees—in other words, the trustees are not trustees for her. No order that I am now making will affect her position in any way. It is very unlikely that she will have any reason to complain of what is done by Mrs. *Bagot*, and it appears that the surplus income from the estate, after keeping down that charge, amounts to several thousands—£3000 a year probably. But I am not at liberty to consider the legal rights of this lady, who is entitled to the rent-charge. All her rights will remain intact. I think I have dealt now with the whole of the points of importance on this head; and the result is that I will make the proper order under which the lady will be entitled to possession or receipt of the rents until further order, with any proper undertakings which may be suggested. The only other point is on the *Settled Land Act* of 1884. The lady asks to be allowed to exercise the powers of a tenant for life; and it is necessary, having regard to the 63rd section of the 1882 Act, as there is a

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trust for sale, that the Court should give permission either to her or to the trustees. It seems to me that it is convenient and proper, under the circumstances of the case, to allow her, as I do, to exercise all the powers of the tenant for life, with the exception of the power of sale and exchange, which she does not ask for. I may observe that the lady cannot cut timber in the circumstances of the title, and of her position with regard to the estate, without the leave of the Court, or the consent in writing of the trustees. Then as to the costs of this application, the lady must pay them. To those unacquainted with this jurisdiction, it would appear, as it did to the learned solicitor in the case I have above referred to, that the Court is setting aside the will or the instrument, which has said that the trustees should have possession and manage the property. A person in the position of this lady, asking the Court to exercise a discretion, there being no case against the trustees, cannot throw upon the estate the costs of doing so. The principle is that it is for the convenience of the lady, there being no circumstance which would warrant the Court holding otherwise, that she should have the possession which the settlement has not given her. If necessary, I shall make the payment of these costs a condition precedent to possession being given up by the trustees.

With reference to the mining leases, there is, I think, a contrary intention shewn in the settlement; therefore whatever is derived under these leases will all be treated as income.

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The following are the material parts of the minutes as arranged after making the Plaintiff's husband a party to the summons:—

The Applicants by their counsel undertaking in manner following, that is to say (then followed undertakings in almost precisely similar words to those given in *In re Wythes* (1), I. to VI. and VIII., the rent-charge of £1500 being specified in IV.).

Let the Applicant, *Frances Anna Mary Bagot*, be let into possession and into receipt of the rents and profits of all the lands comprised in the said settlement until further order. And the Court being of opinion that in the event of any mining lease being granted by the said *Frances Anna Mary Bagot* of any of the said lands under the powers of the *Settled Land Act*, 1882, no part

(1) [1893] 2 Ch. 375.

of the rent or royalty reserved by such lease is to be set aside as capital money. Let the said *Frances Anna Mary Bagot* be at liberty, until further order, to exercise all the powers of a tenant for life under and in accordance with the *Settled Land Acts*, 1882 to 1890, except the powers of sale and exchange. And the Applicants undertaking to pay the costs of the Defendants to the present summons when taxed. Let such costs be taxed as between solicitor and client. Liberty to apply to the Judge in Chambers as to resumption by the said trustees or trustee of possession of the said lands, or any part thereof, and as to any other matter arising under or in connection with this order.

Solicitors: *Spencer Whitehead*, agent for *Hadley & Dain, Birmingham*; *Field, Roscoe & Co.*, agents for *Smith, Pinsent & Co., Birmingham.*

W. C. D.

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## *In re* BISHOPSGATE FOUNDATION.



*Practice—Lands Clauses Act* (8 & 9 *Vict. c.* 18)—*Reinvestment—Costs—Scale Fee—Surveyor's Fee—Apportionment between several Parties—Form of Order.*

The general rule that the costs of a reinvestment in land, of funds paid into Court under the *Lands Clauses Act* by different public bodies, must be borne by these public bodies in equal shares, does not apply, where there is great inequality in the amounts of the different funds, to the scale fee payable on the purchase, and these costs, with the *ad valorem* stamp duty and surveyor's fee, will be apportioned rateably between the different public bodies: *Ex parte Governors of St. Bartholomew's Hospital* (1), followed to this extent.

*Ex parte Bishop of London* (2), and *Ex parte Governors of Christ's Hospital* (3) considered.

# PETITION.

This was an application by the governing body of certain charities, known as the *Bishopsgate* Foundation, for the transfer, to the official trustees of charitable funds, of five sums of Consols in Court, representing the purchase-moneys of different portions of the charity lands, which had been taken by four public bodies, and amounting altogether to £3952 12*s.* 5*d.* These sums were as follows: £1217 1*s.* 5*d.* paid in by the *Eastern Counties and London and Blackwall Railway Company*, now represented by the *London, Tilbury and Southend Railway Company*;

(1) Law Rep. 20 Eq. 369. (2) 2 D. F. & J. 14.
(3) 2 H. & M. 166.

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£95 16*s.* 6*d.* and £2248 0*s.* 5*d.* paid in by the *North London Railway Company*; £215 6*s.* 10*d.* paid in by the Metropolitan Board of Works, now represented by the London County Council; and £176 7*s.* 3*d.* paid in by the mayor and commonalty and citizens of the City of *London.*

By an arrangement between the Petitioner and these four public bodies, who were made Respondents, the petition was to be treated, as far as the costs were concerned, as if it were one for reinvestment in land. The only question was, how these costs were to be borne as between the Respondents.

*E. Ford*, for the Petitioners.

*E. A. Geare*, for the London County Council:—

It was no doubt laid down in *Ex parte Bishop of London* (1) that, as a rule, the costs ought to be borne by the companies equally, but that rule does not apply where there is great inequality, as here, in the amounts of the funds; *Ex parte Governors of St. Bartholomew's Hospital* (2). The *ad valorem* stamp duty has always been apportioned in these cases, and paid rateably to the amount of the purchase-money contributed from each source, and I submit that the costs of the purchase should be apportioned in like manner, if the whole of the costs cannot be apportioned.

*W. Baker*, for the Corporation of the City of *London*, took the same view.

*Carson*, for the *North London Railway Company*:—

The actual costs of the petition are exactly the same, whether the fund is £10,000 or £100. The rule laid down by *Ex parte Bishop of London* is the correct one. There is no necessary connection between the amount of purchase-money and the amount of costs.

[CHITTY, J.:—I see that in *Ex parte Gaskell* (3), *Jessel*, M.R. (4), says, where the petition is for reinvestment, it may make a very great difference whether £10,000 or £100 is to be reinvested, as

(1) 2 D. F. & J. 14.
(2) Law Rep. 20 Eq. 369.
(3) 2 Ch. D. 360.
(4) Ibid. 361.

to the costs of investigating the title of the land purchased, the conveyance and the stamps.]

The mere inequality of the sums contributed by the different public bodies, however great, is not a ground for departing from this rule: *Ex parte Governors of Christ's Hospital* (1); which ought to be followed in the absence of peculiar circumstances of hardship: *In re Byron's Estate* (2); *In re Merton College* (3).

[CHITTY, J.:—Now that the costs of a purchase are regulated by the scale fee, why should not that be apportioned as well as the *ad valorem* stamp? The principle is the same.]

The rule as to non-apportionment has been so long established that it ought not to be lightly departed from.

*R. J. Parker*, for the *London, Tilbury and Southend Railway Company*, adopted this argument.

CHITTY, J.:—

With regard to the contribution for the costs of reinvestment in land to be made by public bodies, as between themselves, the ordinary rule is that laid down by *Ex parte Bishop of London* (4), that they ought to be borne by the companies in equal shares; but within the authority of that case there lies the further proposition, as appears from the order, that the costs of the *ad valorem* stamp duty ought to be paid rateably, according to the amounts contributed; this no doubt was done because it was so easily and readily apportionable. A similar observation would apply to a surveyor's fee if there were one. Now Lord Justice *Knight Bruce* in his judgment says (5): "I do not see any such necessary connection between the amount of purchase-money, and the amount of costs, as would incline me to lay down any general rule for apportioning costs rateably, according to the amounts of the sums forming the purchase-money." Then again Sir *W. Page Wood* in *Ex parte Governors of Christ's Hospital*, referring to the rule laid down by *Ex parte Bishop of London*, says (6): "That rule was fixed expressly to meet the case of

(1) 2 H. & M. 166.
(2) 1 D. J. & S. 358.
(3) Ibid. 361.
(4) 2 D. F. & J. 14.
(5) Ibid. 17.
(6) 2 H. & M. 170.

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inequality of price; and also it determines how far the price is to be an element in the apportionment, viz., to the extent of the stamp duty; and beyond that, the Court acts on the principle that the purchase of a small estate may be just as expensive as that of a large one." In the present case the scale fee has been adopted on the purchase of the land made for this reinvestment, and that again readily furnishes a means of apportionment, so that the observations I have just cited from *Ex parte Bishop of London* (1) and *Ex parte Governors of Christ's Hospital* (2) are no longer applicable to purchases at the present day, since the passing of the *Solicitors' Remuneration Act*, 1881, in cases where the scale fee has been adopted. In the case before me the amounts of purchase-money contributed by these public bodies present a great inequality, and there is that decision of Vice-Chancellor *Malins* in *Ex parte Governors of St. Bartholomew's Hospital* (3), that the rule in *Ex parte Bishop of London* is not intended to apply in cases where there is great inequality in the amounts of the different funds. The result, therefore, is that I think I am justified in this case in apportioning the costs to the extent of the scale fee—that is, the costs of the purchase of this land; and without in any way departing from the rule laid down in *Ex parte Bishop of London*, I think this apportionment ought to be made.

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The following are the material parts of the Order, as drawn by the Registrar:—

Transfer the several amounts of New Consols mentioned in the Schedule. Tax the costs of the Petitioners, including all reasonable charges and expenses incident to obtaining this Order, &c.

"And in such taxation the Taxing Master is to distinguish the costs of the *ad valorem* stamp and the scale fee," under the Rules made in pursuance of the *Solicitors' Remuneration Act*, 1881, "upon the assignment or conveyance of the said estate. And it is ordered that the Respondents," the four public bodies, "do pay to the Petitioners their said costs, charges and expenses when taxed and settled (except such costs as are hereinbefore directed to be distinguished), in equal proportions; and do pay the costs so to be distinguished rateably in proportion to the several amounts of New Consols in the Schedule mentioned."

Solicitors: *Clapham, Fitch & Co.; W. A. Blaxland; H. H. Crawford; Paine & Co.; F. C. Mathews & Browne.*

(1) 2 D. F. & J. 14. (2) 2 H. & M. 166. (3) Law Rep. 20 Eq. 369.

W. C. D.

## *In re* WALKER'S SETTLED ESTATE.

NORTH, J.
1893
Nov. 15.

[1893 W. 1801.]

*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. iv.—Rebuilding—Annual Rental.*

The alteration, reconstruction, and enlargement of a mansion-house where part of the house was unaltered and the walls of another part were utilised :—

*Held*, to be a rebuilding under sect. 13, sub-sect. iv., of the *Settled Land Act*, 1890.

The "annual rental" of settled land within the meaning of the proviso *held* not to include anything in respect of any part of the land in the occupation of the tenant for life, but to include the amount of the rent usually paid for a farm for the moment unoccupied.

THE Applicant in this summons, Sir *James Robert Walker*, was in 1886 and now tenant for life, under the will and codicils of Sir *James Walker* deceased and certain indentures of settlement, of an estate called the *Sandhutton* estate, chiefly in *Yorkshire*. Part of the settled property consisted of capital money under the *Settled Land Acts*.

In the year 1886 Sir *James Robert Walker* altered and enlarged, and in fact reconstructed, the principal mansion-house on the estate called *Sandhutton*.

The mansion-house after reconstruction occupied more ground, and was larger and more convenient than the old house. A small portion of the old house, comprising dining-room and library, and rooms over, was retained unaltered, except that the ceilings and roof were raised, and the rooms made higher than before. Of another portion of the old house the walls, some internal as well as all external, were left standing, but partitions were removed, and the rooms were rearranged. A hall and study were thrown into the drawing-room. A kitchen, passage, hall, and staircase were converted into a larger hall and staircase. The rest of the old house, consisting of offices, service accommodation, and outbuildings, was pulled down, and partly on the same site, and partly on additional ground, were built two parts of the reconstructed house. On the ground-floor of one part

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were the kitchen, servants' hall, and other servants' rooms and domestic offices. On the other, there was on the ground-floor accommodation of a kind not existing in the old mansion—namely, billiard-room, smoking-room, gun-room, business-room, young gentlemen's room, and various lobbies, passages, and other accommodation.

The *Lands Improvement Company, Limited,* were holders of a charge on the inheritance of £1176 11*s.* 8*d.* per annum for twenty-five years from 1888, created to cover part of the expenditure on the alterations and reconstruction, and interest thereon.

The summons asked that the capital money forming part of the settled property should be applied to the payment of so much of the future instalments of the charge as represented capital expenditure to the extent of one-half of the annual rental of the settled land.

*Cozens-Hardy,* Q.C., and *Coltman,* for the tenant for life:—

The *Settled Land Act,* 1890, s. 15, empowers the Court to authorize capital money to be applied in an authorized improvement notwithstanding no scheme has been submitted for approval to the Court or trustees. The section is retrospective, and authorizes the application of capital money to cost of improvement made since 1882: *In re Ormrod's Settled Estate* (1). The *Settled Land Act,* 1887, authorizes the application of capital money in discharge of instalments of a rent-charge, such as there is here created in pursuance of an Act of Parliament with the object of paying off money advanced for the purpose of defraying the expenses of an authorized improvement. That enactment only applies to future instalments: *In re Howard's Settled Estates* (2); *In re Dalison's Settled Estate* (3).

Sect. 13, sub-sect. iv. of the *Settled Land Act,* 1890, enlarges the improvements authorized by the Act of 1882 so as to include the rebuilding of the principal mansion-house on the settled land, provided the capital money to be applied in the rebuilding does not exceed one-half the annual rental of the settled land. If then the Court is of opinion that the reconstruction of the house

(1) [1892] 2 Ch. 318. (2) [1892] 2 Ch. 233.
(3) [1892] 3 Ch. 522.

that has taken place here is a rebuilding within the meaning of the Act of 1890, s. 13, and the rebuilding was proper, the Court will declare that capital money is applicable to pay future instalments of the rent-charge, so far as they represent capital.

We admit that the mere beautifying, or alteration of, or addition to, or improvement of a house is not a rebuilding: *In re De Teissier's Settled Estates* (1); *In re Lord Gerard's Settled Estate* (2).

Another point the tenant for life desires to have your Lordship's expression of opinion on, is as to what is to be included in the "annual rental" of the settled land. For the purpose of limiting the amount of capital money applicable for the expenses of rebuilding, it has been settled that the income of capital money invested ought to be taken into account. The question now is, whether anything should be allowed as representing rental of the house or park in the actual enjoyment of the tenant for life.

*T. L. Wilkinson*, for the first tenant in tail in remainder and his infant sons:—

According to the decision of Mr. Justice *Chitty* in *In re De Teissier's Settled Estates*, there has been no rebuilding, but merely a structural alteration and enlargement. If any part of the house has been rebuilt, I submit there has only been a structural alteration of other parts of the house.

[NORTH, J.:—Can I allow the expenditure on part of the house and not on the rest?]

The two can be severed if necessary, and for that purpose an inquiry might be directed. My contention is there has been no rebuilding.

*Davenport*, for the trustees under the Act.

NORTH, J.:—

I think in this case the whole expenditure may be allowed. I am sorry I have not some more assistance on the point to aid me in deciding what the word means. Having considered the

(1) [1893] 1 Ch. 153.
(2) W. N. (1893) 126; since reported, [1893] 3 Ch. 252.

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matter, I have formed my own view; I think it is a question of fact in each particular case, and that in this case there has been a rebuilding within the meaning of the section. Supposing most of a house front were pulled down and a small part left, and the rest of the house was rebuilt, it could not be said that there was not a rebuilding; again if the house were burnt and the walls were left standing and made use of in erecting the new house, there would none the less be a rebuilding. Nor would the introduction of alterations and enlargements make any difference in that respect. And I do not think it would make any difference if the site were slightly shifted. If the house were built at a distance that would be another matter. That is one view of the case. I do not think, however, it follows that every rebuilding would be a rebuilding authorized by the section. For example, supposing a tenant for life of a large estate, or his predecessor, had been content to live in some mere farm-house or a small villa residence, if he were to erect a large mansion with all the requirements suited to his position as the owner of such an estate, I do not think that that ought to be considered a rebuilding within the meaning of the enactment. I think there must be really a substantial rebuilding, and not merely alterations and enlargements.

[His Lordship examined the particular facts and proceeded:—]

I come to the conclusion that there has been a rebuilding on a somewhat enlarged scale, so as to make the mansion-house, as it exists at present, more suited to modern requirements and the size and value of the estate to which it is now attached. I do not see anything in the section to say that the rebuilding must be for a particular purpose. The purpose of rebuilding is left very much to the discretion of the tenant for life, subject to the assumption that he is acting *bonâ fide*; and it cannot be suggested here that there is any want of *bona fides*. In this case I come to the conclusion that the whole expenditure has been made upon a rebuilding within the Act, and under the circumstances I do not see any reason to direct an inquiry as to what part of the payments should be considered attributable to rebuilding, and what to other expenditure; such an inquiry might be directed in a proper case.

One other point has been raised, namely, what is to be included in the amount of half the annual rental, the limit of the sum to be applied out of capital moneys in the settlement. I am of opinion that the annual rental meant does not include any allowance as a rental value of a mansion and park in the occupation of the tenant for life, nor does it include any sum in respect of a farm held by the tenant for life and farmed by himself; but that it would include the rent usually paid for a farm which happens to be unoccupied for the time, though usually let to a tenant. I will make a declaration that capital money under the Act is applicable in paying instalments charged on the estate, so far as they represent the rebuilding expenditure to the extent of one-half of the present annual rental of the settled estate.

Solicitors for all parties: *Long & Gardiner*, agents for *Crust, Todd, Mills, & Sons, Beverley.*

D. P.

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## *In re* LOFTUS' TRADE-MARK.

NORTH, J.
1893
*Nov.* 17.

*Trade-mark—Application for Registration—Resemblance to Trade-mark perviously registered—Trade-mark accepted for Registration but not actually registered—Renewed Application—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 72, 73—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 14, 15.

In 1887, application was made for the registration of a trade-mark for whisky. The mark consisted of a label which bore on it the device of a ship upon the sea, and also the words "*Unco Guid.*" The Registrar allowed the application, and the mark was advertised in the *Trade Marks Journal*, but, in consequence of the omission of the applicant's agent to pay the registration fee, the mark was not actually registered. The applicant was ignorant of this omission, and believed that the mark had been registered, and in this belief he proceeded to use it in his trade. In 1893 he discovered that the mark had not been registered, and he then renewed his application for registration. The Registrar refused the application, on the ground that in 1889 another mark had been registered for whisky, to which he thought the first mark had such resemblance as to be calculated to deceive. The second mark consisted of a label which bore the device of two lions rampant standing on opposite sides of a bottle, and also the words "*The Unco Guid.*" The owner of this mark had, when he applied for its registration, disclaimed any right to

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the exclusive use of the words. The owner of the first mark made a similar disclaimer :—

*Held*, that, having regard to the disclaimers, there was no such resemblance between the two marks as was calculated to deceive, and that the first mark ought to be registered :

*Held* also, that the non-completion of the registration under the first application was not a bar to the making of a second.

APPLICATION by *Victor Loftus*, a distiller and wine-merchant in *London*, trading as *W. R. Loftus*, for the reversal of the decision of the Comptroller-General of Patents, whereby he had refused an application made by *Loftus* for the registration of a trade-mark for whisky. *Loftus* appealed to the Board of Trade, and, under sect. 62, sub-sect. 5, of the *Patents, Designs, and Trade Marks Act* of 1883, the Board of Trade referred the appeal to the Court.

On the 25th of May, 1893, *Loftus* applied for the registration of a trade-mark for whisky. The mark was printed on a label at the top of which were the words "*Unco Guid*" in large letters; under them the words "*Finest old blended*" in smaller letters; under this a picture of a ship on the sea, and beneath the ship in smaller letters the words "*ad valorem*"; lower down the words "*Highland Malt*," and below them the name and address of *Loftus*. In his application *Loftus* stated that "the essential particular of the trade-mark is the combination of devices, and the Applicant disclaims any right to the exclusive use of the added matter, except his name and address."

*Loftus* had, on the 24th of November, 1887, applied for the registration of the same mark. His application was then accepted by the Comptroller, and a representation of the mark appeared in the *Trade Marks Journal* of the 28th of March, 1888; the number of the mark being 69,880. Owing to the neglect of *Loftus*' agent in not paying some fees the mark was not in fact registered. *Loftus*, however, believed that the mark had been registered, and in that belief he used it extensively in his trade for whisky. In 1893 he discovered for the first time that the mark had not been registered, and he thereupon, on the 25th of May, 1893, made the above-mentioned fresh application for the registration of his mark.

The Registrar objected to make the registration, on the ground that on the 26th of November, 1889, a trade-mark (No. 94,112) for whisky had been registered by *W. Hillcoat*, a wine and spirit merchant at *Glasgow*, which the Registrar considered had such resemblance to the mark which *Loftus* proposed to register as to be calculated to deceive. *Loftus* was not previously aware of the registration of *Hillcoat's* mark. That mark was printed on a label at the top of which were, in large letters, the words "*The Unco Guid.*" Below this was a device consisting of a bottle, on each side of which stood a lion rampant. Each lion had one paw resting on the bottle, and held in the other paw a wine-glass. Below the device was the word "*Whisky*" in large letters. The bottle was represented as having a copy of the label upon it. On the application for the registration of this mark, *Hillcoat* had disclaimed any right to the exclusive use of the added matter.

*Loftus* applied to the Comptroller for a hearing, and upon the hearing the Comptroller refused the application for registration, on the ground that, having regard to sects. 72 and 73 of the *Patents Act*, 1883, as altered by the Act of 1888, the resemblance between the two marks was such as would be calculated to lead to deception.

Notice of the appeal was given to one *J. H. Rogers*, who claimed to be assignee of *Hillcoat's* trade-mark.

*Israel Davis*, for the Appellant:—

The former application in 1887 for registration is not a bar to the present application: *Jackson* v. *Napper* (1).

On the question of resemblance, the effect of the labels as a whole ought to be considered. There is no general resemblance between the two labels. The right to the exclusive use of the words "*Unco Guid*" was disclaimed by *Hillcoat*, and therefore the Appellant has a right to use them, and the mere fact that he does so does not render his mark "calculated to deceive." There is no such resemblance between the two marks as to be "calculated to deceive" within the meaning of sect. 72, sub-

(1) 35 Ch. D. 162.

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sect. 2 (1) of the *Patents, Designs, and Trade Marks Act*, 1883, as altered by sect. 14 of the *Patents, Designs, and Trade Marks Act*, 1888; *In re Hudson's Trade-marks* (2); *In re Atkins' Trade-mark* (3).

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(1) By sect. 10 of the *Patents, Designs, and Trade Marks Act*, 1888, the following sub-sects. 2 and 3 of sect. 64 were (*inter alia*) substituted for the corresponding provisions of sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883: "(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register."

"(3.) Provided as follows:

"(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof."

By sect. 72 of the Act of 1883, as altered by sect. 14 of the Act of 1888: "(1.) Except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade-mark, the Comptroller shall not register in respect of the same goods or description of goods a trade-mark identical with one already on the register with respect to such goods or description of goods.

"(2.) *Except as aforesaid* the Comptroller shall not register with respect to the same goods or description of goods a trade-mark *having such resemblance to* a trade-mark already on the register with respect to such goods or description of goods as to be calculated to deceive." [The alterations are printed in italics.]

By sect. 73 of the Act of 1883 (as altered by sect. 15 of the Act of 1888): "It shall not be lawful to register as part of or in combination with a trade-mark any words the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design." [The only alteration is that the word "exclusive" before "use" is omitted.]

By sect. 16 of the Act of 1888 the following sub-sect. is substituted for sub-sect. 2 of sect. 74 of the Act of 1883: "The applicant for registration of any such addition must, however, state in his application the essential particulars of the trade-mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

"Provided that a person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof."

(2) 32 Ch. D. 311.

(3) 3 Rep. Pat. Cas. 164.

*Ingle Joyce*, for the Comptroller:—

*Hillcoat's* whisky has, no doubt, become known in the market as "*The Unco Guid*," and the Registrar was right in thinking that the use by the Appellant for his whisky of a label bearing the words "*Unco Guid*" would be calculated to deceive. It is not necessary that the resemblance should be in the essential particulars of the trade-mark. If any part of the proposed trade-mark is calculated to deceive, the registration ought to be refused. It is not necessary that the owner of the mark first registered should be able to obtain an injunction to restrain the use of the second. The necessary consequence of registering the Appellant's proposed mark would be that he could call his whisky "*Unco Guid*," and that would be "calculated to deceive." The Registrar ought to consider how the marks would be used in the ordinary course of trade: *In re Speer's Trade-mark* (1); *In re Australian Wine Importers* (2); *Eno* v. *Dunn* (3).

*Israel Davis*, in reply.

NORTH, J.:—

I am reluctant to differ from the Registrar in the exercise of his discretion on a point on which he has a great deal of experience. But the duty of reviewing his decision is cast on me by the Act, and the Appellant is entitled to have my opinion upon it. I think this mark is one which ought to be registered.

The Appellant first applied for the registration of this very mark in November, 1887, and in the *Trade Marks Journal* of the 28th of March, 1888, he was advertised as the person to whom the mark had been granted, and, according to the evidence, he has only recently ascertained that, by reason of the omission on the part of his agent to pay some fees, the mark, though advertised in the *Trade Marks Journal*, has not been actually registered. He now applies to have it placed upon the register, and the fact that he made the former application seems

(1) 4 Rep. Pat. Cas. 521, 524. (2) 41 Ch. D. 278.
(3) 15 App. Cas. 252.

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to me of very great importance in considering whether his present application is a *bonâ fide* one, or whether he is really seeking to be allowed to use a mark which someone else uses, with the view of obtaining a part of the business of that other person. The facts which I have mentioned are to my mind conclusive that it is a *bonâ fide* application, made in order to secure to himself that which he thought he had all along, and which he would have had all along but for an unfortunate slip, of which he must, no doubt, bear the consequences—still, a mere slip by his agent, for which he is not in any way morally responsible.

Then this application was made for the registration of the mark, and notice was served on *Rogers*, the assignee of the mark No. 94,112, which had been registered by *Hillcoat*. *Rogers* did not assent to the application, but he did not appear, and he does not now appear, in opposition to it. When I look at these two marks I see that they are in some respects very different. The shape is different. One seems to be coloured while the other is not, and the designs are very different also. In fact, I cannot see any resemblance between the two, except that they both apply to whisky, though one speaks of "*Highland Malt*," and the other uses only the word "*Whisky*." There is also this important fact, that the words "*Unco Guid*" are printed at the top of each label. In the application for the registration of the mark which is now owned by *Rogers*, the then applicant said: "The essential particulars of the trade-mark are the following: The combination of devices. The applicant disclaims any right to the exclusive use of the added matter." The "devices," as they are there called, are the two lions standing one on each side of the bottle, each waving a glass. The "added matter" is, the words "*Unco Guid*" at the top, and the word "*Whisky*" at the bottom. The present Appellant's application was in exactly the same form. He also stated that the essential particular of his trade-mark was the combination of devices, and he disclaimed any right to the exclusive use of the added matter, except his name and address. There is therefore nothing whatever in common between the marks, except that each contains the words "*Unco Guid*," and those words are disclaimed by each

Applicant. If those words were not there, it could not, in my opinion, be supposed that there was any resemblance between the two labels. The only question is, whether the fact that the words "*Unco Guid*" are found in both marks renders the Appellant's mark calculated to deceive persons who may buy whisky from him by leading them to think that they are getting the whisky which is manufactured by the owner of the other mark. It is a singular fact that the words "*Unco Guid*" are disclaimed by both parties, and the reason for their disclaimer is, that they have no monopoly of those words. The disclaimer is, no doubt, made under sub-sect. 2 of sect. 64 of the Act of 1883 as altered by the Act of 1888. Each of the parties has disclaimed any right to the exclusive use of the words "*Unco Guid*," the meaning of that being that, neither of them being entitled to the exclusive use of those words, other persons are at liberty to use the same words. Each Applicant has disclaimed any right to complain of other persons using the words "*Unco Guid*." Of course, the words might be used in such a way, and with such a combination of other things, as to amount to a passing off of the mark of the person who used them as the mark of another; but that is a different matter. It is not suggested in the present case that an injunction could be obtained by *Rogers*, but it is said that that is not the test. The Registrar, it is said, has more than that to consider, and, though an injunction would not be granted to restrain the present Appellant from using the mark which he proposes to register, yet, it is said, the Registrar has a higher duty to perform, viz., to look at the two designs, and see whether, in his opinion, there is such a resemblance between them as to be calculated to deceive. Looking at these two marks, I come to the conclusion that there is not any such resemblance as to be calculated to deceive. I cannot see how the use in the second of what is admitted by both Applicants to be common property, not exclusively belonging to either of them, is of itself sufficient to make the second mark "calculated to deceive." I have already said that the words might be accompanied by other things, and might be so used with their surroundings as to be very much calculated to deceive; but, looking at the difference between the two marks, I do not think that the words

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are calculated to deceive. And, looking at the history of the Appellant's mark, I do not think it is intended by him to deceive. That being so, I think the Registrar ought to accede to the application for registration.

Solicitors: *Halses, Trustram & Co.; Solicitor to the Board of Trade.*

W. L. C.

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NORTH, J. 1893 *Nov.* 24.

## MALLESON *v.* NATIONAL INSURANCE AND GUARANTEE CORPORATION.

[1893 M. 3468.]

*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), ss. 16, 50—*Companies Act*, 1879 (42 & 43 *Vict. c.* 76), s. 5—*Alteration of Articles—Reserve Capital.*

A company cannot contract itself out of the power to alter its articles.

One of the articles of association provided that £4 a share should be reserved capital not capable of being called up, except in case of a winding-up, and that a special resolution to that effect should be passed in accordance with the *Companies Act*, 1879. No valid special resolution to this effect was passed, and ultimately a special resolution was passed repealing the article:—

*Held*, that this was valid.

THE Plaintiff sued on behalf of himself and all other shareholders of the Defendant company for a declaration that certain special resolutions passed and confirmed at meetings of the company held on the 20th of October, 1893, and the 8th of November, 1893, respectively, were *ultrà vires*, and for an injunction to restrain the Defendants from acting on the resolutions. The action was brought on on motion, on the part of the Plaintiff, for an injunction, and the motion was treated as the trial of the action.

The Defendant corporation was registered as a limited company on the 16th of December, 1891, with a share capital of £2,000,000 divided into 399,900 £5 ordinary shares, and 100 £5 founders' shares.

The Plaintiff was the holder of 415 ordinary shares which he had taken on the faith of a prospectus dated the 14th of December, 1891, inviting subscriptions for a first issue of 200,000 ordinary

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shares of £5 each, on each of which 10*s.* was to be paid by the 24th of February, 1892, and containing the following paragraph: "A further 10*s.* per share may be called up, if the directors consider it expedient, in two instalments of 5*s.* each, with an interval of not less than three months between the instalments, one month's previous notice being given of the dates of each payment. The remaining £4 will be constituted reserve capital, which, under the Act of 1879, it is not competent to the directors to call up."

Of the articles of association the following are material:—

"Reserve Capital.

"12. The sum of £4 in respect of each of the ordinary shares in the initial capital of the company is to be reserved capital, and is not to be capable of being called up except in the event and for the purposes of this company being wound up, and a special resolution to that effect is to be passed in accordance with the *Companies Act*, 1879.

"Calls.

"13. Subject as aforesaid the directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments. A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed. No call shall exceed one-fourth of the nominal amount of the share, and two successive calls shall not be made payable at a less interval than three months.

"14. One month's notice of any call shall be given, specifying the time and place of payment, and to whom such call shall be paid."

On the 14th of April, 1892, a special resolution was passed that £4 a share should constitute reserve capital, not capable of being called up except in case of winding up. A resolution

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purporting to confirm the resolution of the 14th of April, 1892, was passed at a meeting held on the 16th of May, 1892.

It was discovered that the resolution of the 14th of April had not been validly passed, because the confirmatory meeting was out of date. In consequence of a report of a committee of shareholders appointed to inquire into the circumstances of the company at a meeting of the shareholders held on the 20th of October, 1893, special resolutions altering the corporation's articles of association were passed, which were duly confirmed at a meeting held on the 8th of November, 1893. The first two of such resolutions were:—

"(1.) Resolved that the following be substituted for clause 12, viz.:—

"12. The sum of £2 in respect of each of the ordinary shares in the initial capital of the company is not to be capable of being called up except with the sanction of a general meeting.

"(2.) Resolved that a new clause be inserted immediately after clause 12, as follows:—

"12A. The sum of £2 per share in respect of each of the ordinary shares in the initial capital of the company shall be payable as to £1 10*s.* by instalments, as follows—viz., as to £1, at the expiration of seven days after this regulation comes into operation; and as to 10*s.*, further part, at the expiration of six months from the expiration of such seven days; and as to the remaining 10*s.*, further part, as and when the directors shall call up the same; but so that no part thereof shall be called up until after the expiration of twelve months from the expiration of the seven days aforesaid."

On the 8th of November, 1893, the day on which the resolutions were confirmed, a notice was sent to the Plaintiff and the other shareholders requesting payment of £1 a share to the Defendants' bankers, the *British Linen Company*, 41, *Lombard Street, E.C.*, on or before the 15th of November, 1893.

*Everitt*, Q.C., and *Alexander Young*, for the Plaintiff:—

Sect. 16 of the *Companies Act*, 1862, makes every article of a registered company binding as a covenant on each member.

Therefore, every member has covenanted with every other member to carry into effect the 12th original article, and the members, neither individually nor collectively, in the company will be allowed to act in contravention of that article. It would be inequitable to allow the company to do anything in contravention of the stipulation contained in the prospectus to make £4 a share reserve under the Act of 1879.

Articles 13 and 14 are not touched by the special resolutions that were passed; the sums sought to be recovered are calls. Those articles have not been complied with; the company are not, therefore, in a position to sue.

*Swinfen Eady*, Q.C., and *Stokes*, for the Defendant corporation:—

On the true construction of original article 12 and the prospectus, there was merely an expression of intention that steps would be taken to make £4 a share reserved capital under sect. 5 of the Act of 1879—an intention that was attempted to be carried out. If it was intended that such reserve should have been at once constituted, the proper mode of carrying out that intention would have been by a provision in the memorandum of association without reference to the Act of 1879 at all.

Whatever the meaning of original article 12 was, it could not have been effective to prevent the corporation from altering its articles, for a company cannot contract itself out of its power to alter its articles: *Walker* v. *London Tramways Company* (1). Nor can any equitable plea against an action for the money payable on the shares be set up by reason of the prospectus: *Accidental and Marine Insurance Corporation* v. *Davis* (2).

If articles 13 and 14 are inconsistent with the new article 12a, they are therefore repealed *pro tanto*. But the first two payments under that article are not really calls; they are in the nature of application and allotment instalments.

*Everitt*, in reply.

(1) 12 Ch. D. 705. (2) 15 L. T. (N.S.) 182.

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NORTH, J.:—

The point raised here is a nice one, and, so far as I know, a new one; but I am of opinion that the company have taken a step which is within their powers.

The memorandum of the company contains some fundamental provisions relating to the company, but nothing bearing in any respect on the point I have to decide. Then when we come to the articles, there is a very important article, the 12th, under the head of "Reserve Capital." I should say that the shares are £5 shares, and "the sum of £4 in respect of each of the ordinary shares in the initial capital of the company is to be reserve capital, and is not to be capable of being called up except in the event and for the purpose of the company being wound up, and a special resolution to that effect is to be passed in accordance with the *Companies Act*, 1879."

Now, referring to the *Companies Act*, 1879, sect. 5 first makes provision with respect to an unlimited company, and that part of the section I need not read; and then says at the end: "A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up." That is to say, this section is to be brought into play and applied to a particular case by a declaration to be contained in a special resolution of the company.

Now, the provision I read in article 12 being contained in the article is, under sect. 16 of the *Companies Act*, 1862, to bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such article a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such article, subject to the provisions of the Act. But the 50th section of the same Act contains power for the company by special resolution, as mentioned in that section, to make new regulations to the exclusion of, or in addition to, all or any of the articles. First of all, the company

"may in general meeting from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution."

Therefore sect. 16, providing that the articles shall bind the members as if each member had affixed his seal, means the articles as originally framed, or as they may from time to time stand after they have been altered or varied under the provisions of this Act. Therefore, there is clear power to alter the articles, and as altered they will bind the members just in the same way as did the original articles.

This article 12 having been inserted, it is not suggested that it was not the intention of everybody at the time that it should be acted upon and carried out; and accordingly, when the prospectus was issued, a few days after the company was formed, it said with respect to the first issue that "2*s.* 6*d.* is to be payable on application, 2*s.* 6*d.* on allotment, and 5*s.* on the 5th February following," making in all 10*s.*; and then follows this: "A further 10*s.* per share may be called up, if the directors consider it expedient, in two instalments of 5*s.* each, with an interval of not less than three months between the instalments, one month's previous notice being given of each payment. The remaining £4 will be constituted reserve capital, which under the Act of 1879 it is not competent to the directors to call up." Not "is reserve capital" which cannot be called up, but "will be constituted reserve capital;" that is, when you look at the Act and look at the articles, it will be constituted, and that can only be by special resolution.

Then the Plaintiff applies for shares upon the footing of the articles as they stand and the prospectus, and becomes a member, and then he is a member in a company the articles of which may

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from time to time be altered in the way that I have mentioned. For reasons that have satisfied the directors and the company assembled in general meeting, they desired to depart from the scheme indicated by the 12th article in their original articles, and steps were taken to pass a special resolution to accomplish that object. I need not refer to what was done on that occasion further than to say that, by some mistake in all probability, the necessity of having a confirmatory resolution within a month was overlooked, and, though resolutions were passed on the 14th of April, 1892, to the necessary effect, yet those were never confirmed within the period in which it was necessary they should be confirmed. What was done then, therefore, did not amount either to a special resolution under the 12th article, or to such special resolution as is contemplated by the Act of 1879. That was attempted to be cured by the meeting of the 20th of October, 1893, the resolutions at which were duly confirmed on the 8th of November, and there is no doubt that what was done then has the effect of passing special resolutions binding the company if the subject of such resolutions was such as would properly be dealt with at such a meeting.

Now the resolutions so passed provide first "that the following be substituted for article 12." Then it runs thus: "12. The sum of £2 in respect of each of the ordinary shares in the initial capital of the company is not to be capable of being called up except with the sanction of a general meeting." And then that a new clause be inserted immediately after that clause 12, which is to be as follows: "12A. The sum of £2 per share in respect of each of the ordinary shares in the initial capital of the company shall be payable as to £1 10*s.* by instalments, as follows—viz., as to £1, at the expiration of seven days after this regulation comes into operation; and as to 10*s.*, further part, at the expiration of six months from the expiration of such seven days; and as to the remaining 10*s.*, further part, as and when the directors shall call up the same; but so that no part thereof shall be called up until after the expiration of twelve months from the expiration of the seven days aforesaid."

Now it cannot be disputed that the provisions that those two clauses are to be substituted for clause 12 have the effect of

getting rid of clause 12 altogether. That is followed by clauses 13 and 14, which are not dealt with in terms by these resolutions at all, though certain other clauses in the articles were modified. The question is, whether that resolution so passed and so confirmed is within the powers of the company. I see nothing to prevent it being so. Here is a special resolution duly passed inserting these words in the articles of the company, and all the shareholders are bound by it.

It is said that it was contrary to the constitution of the company in some way; but I do not see that it is, for although no doubt the original articles did contemplate a different state of things, they contemplated giving effect to that different state of things, not by making it binding on all persons in such a way that it could not be altered, but by obtaining the passing of a special resolution to accomplish that object. No special resolutions altering the articles ever were passed before, but they have been now; and that being so, I do not see why an article drawn with a view to its being carried into effect by a special resolution should not be displaced when the resolution never was passed and the company have now resolved to get rid of the article, and substitute other provisions in the place of it.

In my opinion, therefore, what was done is not contrary to the provisions of the articles, and is within the powers of the company assembled in general meeting at two meetings held with a proper interval between them.

But then it is said that, even assuming that to be so, the provisions of the 13th and 14th articles, which have not been at any rate expressly repealed or departed from, prevent this resolution from being good.

Now those articles are not expressly repealed. To some extent they certainly are intended to stand, because they must be intended to apply to the 10*s*. of the £2 remaining to be called under article 12a. But while they do apply to that, it is quite clear they are intended to be varied by that article; as article 14 having provided that one month's notice of a call shall be given, 12a provides that as regards the last 10*s*. no part shall be called up until after the expiration of twelve months from the expiration of seven days. Therefore, this is dealing with what is the

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subject of article 14 in a way at variance with the provision of article 14; and it is quite clear that although article 14 is not expressed to be "subject as aforesaid," it is varied to some extent, and intended to be varied, by the resolutions passed at those two meetings in October and November.

Well, then, what is the effect of article 12a as passed? Does it make the first £1 and the 10*s.* calls or not? In one sense they may be said to be calls or sums which the shareholder has notice given to him of, that he has to pay, and it is not until he is told that there is a demand upon him that he can be expected to pay it. On the other hand it is quite clear that they are not calls to be made by the directors, and that is all that that article does refer to. If, therefore, the £1 and the 10*s.* are to be called calls in any sense, in my opinion there is a fresh provision with respect to the time of payment that makes the 13th and 14th articles inapplicable to the case. If on the other hand they are not calls within article 13, because they are not calls made by the directors at all, but sums made payable by the articles of association, then in my opinion article 14 does not apply to them. I therefore think that article 12a is not open to any objection. Under these circumstances the motion fails, and, this being treated as the trial of the action by consent, the action must be dismissed.

Solicitors for Plaintiff: *Stretton, Hilliard, Dale, & Newman.*
Solicitors for Defendants: *Parker, Garrett, & Parker.*

D. P.

## SMITH *v.* HANCOCK.

KEKEWICH, J.

[1893 S. 1674.]

1893 Nov. 22, 23.

*Restraint of Trade—Contract—Breach—Agreement by Vendor of Business not to carry on or be in anywise "interested" in any similar Business—Business carried on by Wife of Vendor trading separately.*

An agreement by the vendor of a business not to "carry on or be in anywise interested in" a business of a similar character, is not broken if the vendor has an interest of a merely domestic or sentimental character in such a business, as, for example, where it is carried on by his wife with her separate estate trading separately from him. To constitute a breach of such an agreement he must have an interest, not necessarily in the profits of the business, but such as touches him directly, and gives him some right to interfere in the business, or some means of gaining an advantage from it.

The Defendant, who had been carrying on the business of a grocer under the style of "*T. P. Hancock*," sold the business to the Plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the Defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. *T. P. Hancock*." The business was managed by the nephew, and the Defendant's wife took some part in carrying it on, but the Defendant took no part. The money necessary for carrying on the business was found by the wife out of her separate estate, and no money whatever was contributed by the Defendant, nor did he share in the profits in any way. He, however, assisted his wife in obtaining the lease of the shop in her own name, and, as she was disabled by rheumatism from writing, he wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own, and introduced the nephew to some provision merchants, and attended at the bank when his wife opened the banking account for the business in her own name:—

*Held*, that there had been no breach of the agreement by the Defendant.

PREVIOUSLY to March, 1886, the Defendant, *Thomas Prosperous Hancock*, carried on, under the name or style of *T. P. Hancock*, the business of a grocer, provision dealer, and baker in *Heathcote Street, Kidsgrove*, in the county of *Stafford*. His wife and her nephew, *John Kerr*, assisted him in the business. There were no children of the Defendant's marriage.

In March, 1886, the Defendant sold the business with the

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premises, fixtures, utensils and goodwill, to the Plaintiff for the sum of £2000 (exclusive of stock-in-trade), and entered into an agreement dated the 31st of March, 1886, whereby he undertook "not to carry on or be in anywise interested in the business of a wholesale or retail grocer and provision dealer and baker or any of them," within a distance of five miles from the premises in *Heathcote Street* during a period of ten years.

After the execution of the agreement the Defendant ceased to carry on business of any kind.

In the year 1893, the Defendant's wife became desirous of starting her nephew in the business of a grocer. The Defendant was unwilling that she should do so, but she persisted. It appeared that she was entitled to separate property, consisting in part of money belonging to her before marriage, and in part of savings out of the money allowed by her husband for household expenses, such savings having been made by her with his knowledge, and with his assent to their becoming her separate property. With this money, to the amount of about £200, she took and stocked a shop in *Kidsgrove*, about 200 yards distant from the Plaintiff's shop, in which the business of a grocer was carried on in her name of "Mrs. *T. P. Hancock*." The business was conducted by her nephew, she herself taking some part in it, principally on Saturdays. All goods were ordered and paid for in her name, by cheques drawn by her nephew on her banking account, which she opened and kept in her name of *Agnes Hancock*. The lease of the premises was taken in the same name. All moneys in connection with the business were received by her nephew, and paid or accounted for by him to her, and by her applied in paying weekly outgoings and his wages and board.

The Defendant assisted his wife in the negotiations for the taking of the lease, and, as she was disabled by rheumatism from using her right hand, he himself wrote out the circular which was to be issued when the business was opened, and which contained an invitation to "old friends" to come to the shop, and a reference to a tea said to have been formerly sold under the name of "Mrs. *Hancock's* mixture." He also distributed copies of the circular to certain persons, including a tenant of his, and

introduced the nephew to provision merchants. He was also present at the bank when the banking account in his wife's name was opened. He did not otherwise concern himself in any way in the business, nor render any services in, or contribute any money to, the management of it.

On the 8th of May, 1893, the Plaintiff brought this action, claiming an injunction to restrain the Defendant from carrying on or being in anywise interested in the businesses of a wholesale or retail grocer and provision dealer and baker or any of them within the distance and during the period stipulated for by the agreement of the 31st of March, 1886, and damages.

*Warmington*, Q.C., and *A. D. Tyssen*, for the Plaintiff:—

There has been a breach by the Defendant of his agreement not to "carry on or be in anywise interested in" the business of a grocer. The carrying on of this business in the name of the Defendant's wife was a mere device to evade the agreement. She was in fact the agent of her husband, the business was his business, not hers, and was "carried on" by him within the meaning of the agreement.

But if the Court be of opinion, upon the evidence, that the Defendant did not carry on this business in the name of his wife, he has broken the agreement not to be "in anywise interested in" the business of a grocer. A husband, living with his wife, is necessarily interested in a business carried on by her; still more so, where, as here, he has acted for her in reference to the business: see *Newling* v. *Dobell* (1), where *Malins*, V.C., said that every journeyman or workman was "interested" in his master's business. It is immaterial that the Defendant, acting as the agent of his wife, received no remuneration. He might, in law, have recovered from her on a *quantum meruit* for his services. The assistance he gave her in obtaining the lease, his preparation of the circular, the distribution of it by him when prepared, his introduction of the nephew to provision merchants, and his attendance at the bank when the account was opened in his wife's name, were all "interested" acts within the meaning of the agreement.

(1) 38 L. J. (Ch.) 111.

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[They further contended on the evidence that the wife had in fact no separate estate, and that therefore the business was necessarily that of the husband, and referred to *Mews* v. *Mews* (1).]

*Renshaw*, Q.C., and *Brinton*, for the Defendant:—

There has been no breach of the agreement, and the action must therefore fail. It is clear that the Defendant has done no act amounting to a "carrying on" of the business in any sense of those words: see *Allen* v. *Taylor* (2); *Lewis* v. *Graham* (3). Nor was he "in anywise interested" within the meaning of the agreement. "Interested" must mean pecuniarily interested, *i.e.*, interested in the profits of the business—as your Lordship said in *Hill* v. *Hill* (4), interested means in commercial language entitled to profits.

[KEKEWICH, J.:—In *commercial* language, there can be no doubt that the word has that meaning.]

This is a commercial contract. We submit that in order that the Defendant should be "interested" within the meaning of this agreement, he must have some interest in the returns or losses resulting from the business, *i.e.*, an interest such that he would be liable if the business incurred debts; that an action in reference to it ought to be brought against him; that he could be adjudicated bankrupt in respect of the concerns of the business; and that if judgment were recovered against him as to some matter outside the business, stock in trade of the business could have been taken in execution.

[Upon the question of separate estate, they referred to *Lovell* v. *Newton* (5).]

*Warmington*, in reply:—

The words of the agreement are "in anywise interested." That is the broadest possible language. The expression "in anywise" cannot be disregarded. It would be doing violence to the language to say that "interested" is to be restricted to meaning interested by way of profit. If the expression of your

(1) 15 Beav. 529.
(2) 19 W. R. 35.
(3) 20 Q. B. D. 780.
(4) 35 W. R. 137.
(5) 4 C. P. D. 7.

Lordship's opinion quoted from *Hill* v. *Hill* (1) amounts to a decision, it is merely as to the commercial meaning of the word "interested," and not that in a clause like this the commercial meaning is the only one that could be attached to the word. The motive of the Defendant and his wife in starting this business, and carrying it on under the name of "Mrs. *T. P. Hancock*," obviously was to appropriate as much as possible of the goodwill which the Defendant sold to the Plaintiff; and it is certain that without the Defendant's assistance his wife could not have started this business. In any view of the case the Defendant ought not to receive any costs: see *Allen* v. *Taylor* (2), where Lord *Romilly* dismissed the action without costs on the ground that the defendant was obviously seeking to resume his old business.

KEKEWICH, J.:—

Except so far as the construction of the agreement may be properly treated as a matter of law, there is no doubt about the law applicable to this case. As the law now stands a married woman may engage in business on her separate account; she may carry on business with all the responsibilities and all the advantages of a *feme sole*, and without in any way pledging the credit of her husband, or giving him any advantage arising therefrom. If, therefore, this business which is attacked is the business of *Agnes Hancock*, it may be a business with which her husband, the Defendant in this action, has nothing whatever to do, and which is also outside the meaning of this agreement, whatever its proper construction is. The real question for me to decide, apart from the question of construction, is whether it is the wife's business. That is the question which is submitted to me, and which might with propriety be submitted to a jury. Mr. *Warmington* says that the motive which induced the conduct of the Defendant and his wife is clear. In one sense it is. That is to say, there was more than one motive. The first object or motive was to find some employment for the wife's nephew. I do not think, after having heard the whole of the evidence, that I can doubt that the intention and object of Mrs. *Hancock*, with

(1) 35 W. R. 137. (2) 19 W. R. 556.

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the ultimate concurrence of her husband, was to make some provision for the nephew by giving him a start in trade; but there came in another motive, which was that, the grocery business being the business in which it was decided to start him, it was desired to secure, if possible, a large amount of the goodwill of the business which the Defendant sold to the Plaintiff; that is to say, to get together the old customers, and let them know that the wife of the gentleman who served them before was now carrying on a similar business. I agree that to that extent the motive is perfectly clear; and that may be conduct of which persons of delicate sentiment may not approve. Many persons may think that to evade an agreement of this kind is dishonest. With that I have nothing to do. If it is in truth an evasion, that is to say, if the parties concerned have kept outside the agreement, the Plaintiff has no legal rights, and the action must fail. The question is whether the agreement has been evaded or kept outside of, or has been broken.

First, it is said that a married woman cannot carry on a separate business without separate estate. That is a somewhat broad proposition. But assuming that it is true in so many words, there is nothing here to throw any doubt on the sworn allegation that she had separate estate.

[His Lordship referred to the evidence, and said that it was conclusively proved that Mrs. *Hancock* had separate estate. He then continued:—]

That money she put into the business. The lease was taken in her name. The goods were ordered in her name, and paid for in her name—it is true, not by her herself, but by her nephew, the manager, by cheques on her banking account. The money received by her nephew was accounted for by him to her. She paid the ordinary weekly outgoings and his wages and board out of that, and she by his hand paid the balance into the bank. The evidence shews that from first to last it was her separate business, carried on by her on her own account. But that may be a cloak—a device in order to enable her to do ostensibly on her own account, but secretly as her husband's agent, what he could not, without breaking the agreement, do himself. What is the evidence against him? It is attempted to be shewn that

he acted for her in matters connected with the business. There is nothing, as I understand the law, to prevent a married woman, trading separately in respect of her separate estate, from having any agent she pleases. There is nothing to prevent her employing, and even paying her husband as her agent. If in a case of this kind one finds facts of that character, it would of course increase and exaggerate the suspicion which is naturally felt in all such cases, and perhaps drive one to the conclusion that instead of being an agent, the husband was the principal. Somebody else, namely her husband, sees about taking the lease; somebody else, namely her husband, introduces the manager to provision merchants, and he not unnaturally gives some assistance in preparing the circular, and does, I dare say, many more things for her than we have heard of. But that does not seem to me to convert him into a principal. He is still her agent, assisting her, perhaps going near the border, but at the same time not transgressing it. Then it is said that she trades in the name of "Mrs. *T. P. Hancock*," instead of "*Agnes Hancock*." Really I fail to see anything in that, except that, no doubt, she wished the business to be known as something flowing from and not unconnected with the business formerly carried on by her husband. But I cannot see any evidence in that that the husband, and not the lady herself, is the proprietor of and carries on the business. Her name is Mrs. *T. P. Hancock*, and though she might sign as *Agnes Hancock*, I do not know why she should not be called, as most married women are, by the name of her husband with the prefix "mistress." Then as to the circular; no doubt it was an invitation to friends who used to know her and her husband in the old business, and I dare say—though the evidence does not quite come to that—that there is in the circular a reference to a tea which the customers of the old business used to buy. Then it is said that he took some part in framing the circular. I have no doubt he did. He certainly wrote it out with his own hand, she unfortunately being disabled from using hers, and more than that he distributed it to certain persons, including his own tenant. That was a dangerous thing to do; but I cannot think that the distributing of a circular concerning a

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business to be carried on by a man's wife would be a carrying on of or being interested in the business by him. What is the meaning of "carrying on or being in anywise interested in" a business? I do not propose to dwell upon the phrase "carrying on," as to which one or two cases were referred to. It cannot be maintained that the business was in any sense of the word carried on by him, unless it can be proved that his wife acted as his agent. There is a little more difficulty about the words "in anywise interested in." Reference has been made to an expression of my own in a case of *Hill* v. *Hill* (1), where I said that "interested," in a commercial sense, meant entitled to profits. So I apprehend it does. But I do not think that commercial language ought necessarily to be imported into such a contract as this, and construed strictly. I did not say so there, and I do not say so now. But, putting that aside, I have not much guide to the meaning of the word "interested," which is not enlarged, as I think, by the words "in anywise." Reference has been made to the case of *Newling* v. *Dobell* (2). The comment on that case is, that it is not the case I have here. There the words were "concerned or interested in the business of a tailor," and the defendant was doing something quite different from what the facts shew the Defendant has been doing here. There, the man who was bound by a covenant not to be concerned or interested in the business of a tailor had become foreman of a tailor within the prescribed radius. Vice-Chancellor *Malins* thought that he was concerned or interested within the meaning of the covenant. I need not criticise that case. I take it to have been rightly decided on the facts before the Court. The Vice-Chancellor referred to *Rolfe* v. *Rolfe* (3) as being, as he says, a similar covenant. I have referred to that case, and the covenant there was very differently worded. I do not think that the cases referred to lend me much assistance. It was argued on the part of the Plaintiff that any interest, in the widest sense of the word, would be sufficient. I am glad to be interested in the professional success of my friends at the Bar. Surely that is not being interested in their business. I put to

(1) 35 W. R. 137. (2) 38 L. J. (Ch.) 111.
(3) 15 Sim. 88.

Mr. *Tyssen* the case, which I dare say is familiar to some of us, of a man advancing money to start his son in a trade or profession. Is he interested in his son's business by reason of that advance? Yes, but I cannot conceive that that is being "interested" within the meaning of the word as used in this agreement. It is something more than that. No doubt, when a business is carried on by a wife, it is impossible that her husband should not be interested in the business, and in one sense he may even have a pecuniary interest in it, because, if the business fails, and the wife's money is lost, he will have to make different provisions for his wife from those which he has made hitherto. But there, again, it would be stretching language far too much to say that he is in anywise interested in the business of his wife, within the meaning of an agreement such as this. It must be an interest, not necessarily in profits, but an interest which touches a man directly, giving him some right to interfere in the business, or some means of gaining an advantage from it, and not an interest of a domestic or sentimental character, such as in the illustrations which I have given, and which are only intended to be illustrations, and not to be exhaustive. Beyond that I do not intend to define the meaning of the word. All I say is, that when I find it proved that a married woman is carrying on a business with her separate estate, trading separately from her husband, so as not to pledge his credit or give him any share of the advantage to be gained from the success of the business, I consider that he cannot be said to be in anywise interested in the business. That seems to me to be the conclusion of this case; and the Plaintiff, therefore, however much he may think—and I am not sure he has not some reason for thinking—that the agreement has been evaded, still must be content with the conclusion that it does not reach the actual case which has occurred. Therefore the action fails, and there must be judgment for the Defendant with costs.

Solicitors: *Cronin, Orgill, & Cronin*, agents for *Llewellyn & Ackrill, Tunstall; Chester & Co.*, agents for *E. A. Paine, Hanley.*

C. C. M. D.

KEKEWICH, J.

1893 Nov. 21, 28.

# EYRE *v.* WYNN-MACKENZIE.

[1892 E. 1560.]

*Mortgagor and Mortgagee—Life Estate—Mortgage—Covenant for Payment of "all Moneys which may become owing to Mortgagee by Mortgagor"—Solicitor-Mortgagee—Income, Receipt of by Mortgagee—Agent—Partner of Solicitor-Mortgagee — Profit Costs — Clogging Redemption — Re-opening Settled Account.*

A solicitor-mortgagee cannot, in the absence of express agreement, charge the mortgagor with any profit costs, either for work done in respect of the mortgaged property as solicitor for the mortgagor, including the preparation of the mortgage to himself, or, where the mortgage is of a life interest, of collecting, receiving, and distributing the income as agent for the mortgagor: but, *semble*, this rule does not preclude a partner of the solicitor-mortgagee from receiving remuneration for his trouble: *In re Doody* (1).

A covenant in a mortgage of a life estate to the solicitor of the mortgagor for payment, not only of the specific sum advanced, with interest, but also of "every other sum of money which may hereafter be advanced or paid by the mortgagee to or on account of or become owing to the mortgagee by the mortgagor," does not include profit costs and charges of the mortgagee, either as solicitor to the mortgagor or as his agent, for receiving and distributing the income, such a covenant being, as regards profit costs and charges, void as clogging the equity of redemption; and the Court will give the mortgagor leave to surcharge and falsify settled accounts between the mortgagor and mortgagee, so far as regards such costs and charges, unless the mortgagee can prove that the mortgagor was at the time made fully acquainted with his legal rights in respect of those items.

By an indenture of mortgage dated the 1st of January, 1870, and made between the Defendant, *Stanley John Wynn-Mackenzie* and *Charlotte A. Wynn-Mackenzie*, his wife, of the one part, and Sir *Charles Roderick McGrigor*, Bart., of the other part, Mrs. *Wynn-Mackenzie's* life estate under the will of her father, *Thomas Wynn*, deceased, and all other property to which she or her husband, in her right, was or should become entitled under the said will, were assigned by Mr. and Mrs. *Wynn-Mackenzie* to Sir *C. R. McGrigor*, by way of mortgage, for securing the repayment to him of £300 and interest, and all such further sums, if any, as he should advance to them or either of them.

By another indenture of mortgage dated the 24th of December,

(1) [1893] 1 Ch. 129.

1873, and made between Sir *C. R. McGrigor*, of the first part, Mr. and Mrs. *Wynn-Mackenzie*, of the second part, and the Plaintiff, *George Lewis Phipps Eyre*, of the third part, in consideration of the sum of £348 16*s.* 3*d.* (being the amount then due on the previous mortgage) then paid by the Plaintiff, *Eyre*, to Sir *C. R. McGrigor*, at the request of Mr. and Mrs. *Wynn-Mackenzie*, and of the further sum of £151 3*s.* 9*d.*, then paid by the Plaintiff, *Eyre*, to Mrs. *Wynn-Mackenzie*, with the consent of her husband, making a total advance by the Plaintiff *Eyre* of £500, Mr. and Mrs. *Wynn-Mackenzie* (as to the latter, so as to bind her separate estate) jointly and severally covenanted with the Plaintiff, *Eyre*, for payment to him of the sum of £500, with interest at 7 per cent. per annum, and of "Every other sum of money which may hereafter be advanced or paid by the said *G. L. P. Eyre*, his executors, &c., to or on account of or become owing to him or them by the said *S. J. Wynn-Mackenzie* and *C. A. Wynn-Mackenzie*, or either of them, their or either of their executors or administrators, or the assigns of the said *C. A. Wynn-Mackenzie*, with interest thereon at the rate of 7 per cent. per annum from the time of the same respectively being advanced or paid or becoming owing"; and the previously existing mortgage debt, and the securities for the same, were thereby transferred and assigned to the Plaintiff *Eyre*, by way of mortgage for further securing the £500 and further advances. This deed was prepared by the Plaintiff *Eyre*, the mortgagee, who was a solicitor; and from the date of the deed he proceeded to act as solicitor to both Mrs. *Wynn-Mackenzie* and her husband. Notice of the mortgage was given to Mr. *Jarvis*, the sole trustee of the will of the lady's father, and she and her husband also gave him a request in writing to pay in future to the Plaintiff *Eyre* all remittances in respect of her interest under the will. Mr. and Mrs. *Wynn-Mackenzie* subsequently executed several indentures of further charge in favour of the Plaintiff, as security for various further advances.

Mrs. *Wynn-Mackenzie* died on the 11th of October, 1888, indebted to the Plaintiff, as he alleged, to a considerable amount. From 1877 to 1881 the Plaintiff had partners with him in his business, and from the date of the mortgage of 1873, and thenceforward down to the death of the lady, he or his firm acted as

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solicitors to Mr. and Mrs. *Wynn-Mackenzie.* From Mrs. *Wynn-Mackenzie's* death until the early part of 1889 *Eyre* acted alone as her husband's solicitor. Disputes then arose between the Plaintiff and Mr. *Wynn-Mackenzie* as to the amount due on the mortgage securities, and in particular as to the deductions from time to time made by the Plaintiff from Mrs. *Wynn-Mackenzie's* income for bills of costs due for work done by the Plaintiff as solicitor to her and her husband; and ultimately, on the 12th of December, 1892, the Plaintiff issued the writ in this action against the Defendant, Mr. *Wynn-Mackenzie,* claiming an account of all sums of money owing to him in respect of bills of costs or otherwise by the Defendant and his late wife (of whom he was administrator), or either of them, with interest, under the covenant contained in the mortgage of 1873 and the subsequent further charges; payment by the Defendant of the amount which should be found due upon taking such account; and the costs of the action.

On the 21st of December, 1892, the Plaintiff took out a summons to have the account taken. The summons was supported by affidavits by the Plaintiff, stating to the following effect: Shortly before the execution of the mortgage of 1873 Mrs. *Wynn-Mackenzie* came to the Plaintiff and asked him for a loan sufficient to pay off the mortgage of 1870, and also for a further advance, and to make her a regular monthly allowance, in continuation of the arrangement which then subsisted between herself and her then mortgagee, Sir *C. R. McGrigor.* The Plaintiff, though with some reluctance, consented to comply with her request, and to act as her banker or agent with respect to her income, but with the condition, to which she agreed, that he was, as her solicitor, to charge for the receipt and application of her income, and for all work done in carrying out the arrangement. In pursuance of that arrangement the mortgage of 1870 was paid off, and that of 1873 executed, the Defendant, Mr. *Wynn-Mackenzie,* being fully aware of the arrangement between his wife and the Plaintiff. Under the notice or authority given to *Jarvis,* the trustee of the will, Mrs. *Wynn-Mackenzie's* income was remitted to the Plaintiff, who accordingly, down to her death, acted as her banker or agent in carrying out the arrangement, and made her a regular

monthly payment, and also paid her many additional sums, whether he had the money in hand or not, charging her interest on moneys advanced, and allowing her interest on money received; rendering cash accounts to her from time to time in which were debited his costs and charges for the work done by him from time to time in carrying out the arrangement, and also his costs, or the costs of his firm, for work, involving a large amount of correspondence, done by him or them as solicitor or solicitors for her and her husband, bills of which costs and charges were in every case duly delivered to her. During the period the Plaintiff was in partnership all bills of costs, whether for work done by him as banker or agent, or by him or his firm as solicitor or solicitors for Mr. or Mrs. *Wynn-Mackenzie*, were treated as partnership debts, and divided accordingly between himself and his partners. All the payments made and work done by the Plaintiff or by his firm were so made and done on instructions received from Mrs. *Wynn-Mackenzie* or from her husband. The several bills of costs delivered by him or his firm were formally approved in writing by both Mr. and Mrs. *Wynn-Mackenzie*. Among the items so approved were charges for the preparation of the mortgage of 1873 and further charges. The Plaintiff submitted that all the accounts had been settled and ought not now to be re-opened. The Defendant filed affidavits in opposition disputing the accuracy of the accounts, and stating that he had been advised that the Plaintiff had improperly charged the bills of costs in question, inasmuch as they contained many items of profit charges for work alleged to have been done by the Plaintiff, which, if done at all, was done by him in his capacity of mortgagee; also that any costs which might be properly charged by the Plaintiff against him, the Defendant, or his wife, could not, having regard to the words relating to further advances contained in the mortgage of 1873, be added by the Plaintiff to his security.

Upon the summons coming before Mr. Justice *Kekewich* in Chambers, his Lordship declined to make any order upon it at that stage of the proceedings, and ultimately directed that the hearing of the summons should be treated as the trial of the action upon certain issues of fact. One was whether or not the alleged

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arrangement between the Plaintiff and Mrs. *Wynn-Mackenzie* in 1873 was ever made, and whether or not it was agreed between them that the Plaintiff should be entitled to charge for the receipt and application of her income, and for work done in carrying out such alleged arrangement. Another was whether the Plaintiff, when receiving Mrs. *Wynn-Mackenzie's* income, as above stated, was acting as her banker or agent in carrying out the said alleged arrangement, or as mortgagee in possession of the said income, and whether the payments made and work done by the Plaintiff, as alleged by him, were so made and done as such agent or as such mortgagee. Another issue was whether the accounts asked for in the action should be taken on the footing that the Plaintiff was liable to account, (1.) as mortgagee in possession, for all moneys which he had or, but for his wilful default, might have received; and (2.) as solicitor-mortgagee, and as such not entitled to make any profit charges for any work alleged to have been done by him in any manner relating to the mortgage of 1873 and further charges.

The summons now came on for hearing, being treated as the trial of the action upon the above issues of fact. The Plaintiff was cross-examined on his affidavits, when he frankly admitted that his alleged arrangement with Mrs. *Wynn-Mackenzie* was a verbal one only, and that he could not produce any documentary evidence of it beyond the bills of costs which had been approved of both by her and by the Defendant, her husband.

It was admitted early in the argument that, upon the facts, the Plaintiff must be regarded as agent only for Mrs. *Wynn-Mackenzie*, and not as mortgagee in possession.

*Warmington*, Q.C., and *Eyre*, for the Plaintiff:—

The main question is whether the Plaintiff, as solicitor-mortgagee, is entitled, in his mortgagee's account, to charge profit costs. We say that he has established an express contract on the part of the mortgagors to pay them, and therefore is not affected by the rule laid down by the authorities, such as *In re Roberts* (1), that a solicitor-mortgagee is not entitled to profit costs. At all events, there is no principle that his partner is not

(1) 43 Ch. D. 52.

to be allowed remuneration for his trouble: *In re Doody* (1). The facts do not establish that the Plaintiff is in the position of mortgagee in possession. His real position is that of agent for the mortgagors, and he is therefore entitled to charge as such.

The accounts between the Plaintiff and the mortgagors have been long since settled, and it is now too late to re-open them: *Blagrave* v. *Routh* (2); *Lawless* v. *Mansfield* (3).

*Marten*, Q.C., and *Gurdon*, for the Defendant:—

We admit we cannot contend that the Plaintiff is to be treated as mortgagee in possession; but we rely on the general principle that a mortgagee cannot clog the redemption by any by-agreement; that no person can, under the colour of a mortgage, take any collateral advantage either by charging for receiving income or otherwise: *Chambers* v. *Goldwin* (4); *Langstaffe* v. *Fenwick* (5); *Eyre* v. *Hughes* (6); *Broad* v. *Selfe* (7); *James* v. *Kerr* (8); *Field* v. *Hopkins* (9); *Salt* v. *Marquess of Northampton* (10). It has been expressly decided that a solicitor-mortgagee cannot charge profit costs, either for the preparation of the mortgage to himself or for other professional work: *In re Roberts* (11); *Field* v. *Hopkins*; in which latter case the covenant in the mortgage deed for the payment of all moneys that might become due from the mortgagor to the solicitor-mortgagee was in the same form as the covenant in the present case, and it was held that the covenant did not cover profit costs.

As to lapse of time being a bar to re-opening settled accounts, *Blagrave* v. *Routh* is a totally different case to the present.

[KEKEWICH, J.:—You need not trouble yourself with that point.]

Then, as to the form in which to take the account. The Defendant should be at liberty to surcharge and falsify. The Plaintiff must be charged with all receipts in respect of the

(1) [1893] 1 Ch. 129.
(2) 8 D. M. & G. 620.
(3) 1 D. & War. 557.
(4) 9 Ves. 254, 271.
(5) 10 Ves. 404.
(6) 2 Ch. D. 148.
(7) 11 W. R. 1036.
(8) 40 Ch. D. 449.
(9) 44 Ch. D. 524.
(10) [1892] A. C. 1; 45 Ch. D. 190, *sub nom. Marquess of Northampton* v. *Pollock*.
(11) 43 Ch. D. 52.

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mortgaged property, and he cannot discharge himself from any sum by reason of the same representing profit costs due to him as solicitor. He must account in the capacity of an ordinary mortgagee, and in no other.

*Eyre*, in reply:—

[KEKEWICH, J.:—The question is whether these costs can come into a mortgage account.]

The cases cited on the other side are those in which the mortgagee has bargained for a commission or bonus—that is to say, in addition to providing for interest, a bargain is made for a further sum being paid without any work being done. But this case is one, not of taking a commission or bonus, but of a man as a solicitor, not as a mortgagee, undertaking certain work. He discharges that work, as is shewn by the correspondence extending over several years; it relates to the receipt and distribution of the lady's income and the payments which are to be made to her; work, that is, which no solicitor would undertake unless he was paid. Separate considerations are to be applied where work is to be done, and where money is to be paid without any work being done. Being an agent, and not a mortgagee in possession, I submit the Plaintiff is entitled to charge. It may be noticed that in *Mainland* v. *Upjohn* (1) commission was allowed to the mortgagee.

*Marten*, in reply, on *Mainland* v. *Upjohn*:—

In *Marquess of Northampton* v. *Pollock* (2) Lord Justice *Cotton* said that the question was whether the parties had fairly agreed that redemption should only be on payment of a sum larger than that mentioned in the mortgage deed. Here no such agreement has been established.

1893. Nov. 28. KEKEWICH, J.:—

The object of adjourning this summons into Court was to obtain a decision on certain points known to arise on the accounts, so that such accounts might be taken, in the first instance, on

(1) 41 Ch. D. 126. (2) 45 Ch. D. 190, 212.

the footing of the decision so obtained, and the inconvenience, expense, and delay of raising these points by summons to vary the Chief Clerk's certificate might be avoided.

The first question is whether the Plaintiff, Mr. *Eyre*, ought to be regarded as mortgagee in possession. That is not a practical question, unless he is to be charged with what might, but for his wilful neglect or default, have been received by him in addition to his actual receipts, or there is to be some direction respecting annual or other rests. Mr. *Marten* admits on behalf of the Defendant that there is nothing of the kind possible, and he therefore does not argue that Mr. *Eyre* was mortgagee in possession. I do not see how he could be. He received what he did receive as agent for Mrs. *Wynn-Mackenzie*, the mortgagor, under liability to account to her; and that relationship seems to me to be inconsistent with the character of mortgagee in possession. There is no occasion to pursue this subject further.

Another and more important question is whether Mr. *Eyre* is entitled to make professional charges for work done in his character of agent. The arguments raised several distinct points which must be dealt with separately. First, it is said that at the time of the first advance there was a special verbal contract between Mr. *Eyre* and Mrs. *Wynn-Mackenzie* that these charges should be made. This is not supported, and indeed is not pretended to be supported, by any document; and it is strange that, if such stipulation was made by Mr. *Eyre* and was assented to by Mrs. *Wynn-Mackenzie*, no memorandum of it should have been preserved, and even no entry found in Mr. *Eyre's* bills of costs or diary. It was attempted to be proved by Mr. *Eyre's* evidence only. I do not for a moment suggest that he desired to do otherwise than to state the truth according to the best of his recollection and belief. I wish further to say that the caution with which he answered questions on cross-examination did him credit, and exhibited a natural and reasonable reluctance to be over-positive about what passed at that unrecorded interview twenty years ago.

Having regard to all these circumstances, and to the further fact that the charges are endeavoured to be made against the

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estate of a deceased lady, who was the only other person present at the interview in question, I think it would be wrong to hold that the alleged special contract is proved.

Independently of special contract, what right has Mr. *Eyre* to make these charges? Because he is agent, and entitled to be paid for his services? What is the agency? That of solicitor-mortgagee. Mr. *Eyre* is probably accurate in saying that he did not seek and did not want this business; but he was persuaded to accept at one and the same time a transfer of the mortgage; and all the circumstances, including the notice to Mr. *Jarvis*, point to the conclusion that the advances—or rather the security for them—and the agency were inseparably connected. He became the agent because he became the mortgagee. He would not have been mortgagee unless he had been also agent. In the latter character he had the means of keeping down interest on advances, and prospectively, if not actually, the means of reducing the principal. The result is that Mr. *Eyre* was, as regards the agency, just as he was as regards the mortgage, in the position of solicitor-mortgagee. It is now well settled that a solicitor-mortgagee cannot charge profit costs, as against his client, for business done in connection with the mortgage; and I need not refer in detail to the cases which were cited in argument, as for example, *In re Roberts* (1) and *In re Wallis* (2).

It may be somewhat ungracious on the part of Mr. *Wynn-Mackenzie*, especially as representing his wife's estate, to take the objection of which I have just disposed, now after she, and probably he also, has had the full advantage for many years of Mr. *Eyre's* services; but unless there be conduct equivalent to acquiescence, or any other ground compelling the Court to regard objections as waived, I cannot disallow them if good in law, however ungracious.

But it is urged that all these sums claimed by Mr. *Eyre* are properly charged or covered by the mortgage. I do not see how they possibly can be if they are not properly charged independently of the mortgage; but, apart from that, the language of the mortgage is insufficient. True, it is wide enough to cover

(1) 43 Ch. D. 52. (2) 25 Q. B. D. 176.

any sum coming due from mortgagor to mortgagee under any circumstances whatever—that is, any "conceivable indebtedness," to use Lord Justice *Lindley's* words: as, for instance, for a house or horse sold during the subsistence of the mortgage contract. The case of *Field* v. *Hopkins* (1), from which I have just quoted, is a direct authority that this is not the proper construction of such an instrument. The words of the mortgage in that case do not substantially differ from the words of the mortgage in this; and, as Lord Justice *Cotton* says, they only apply to sums advanced or paid by the mortgagee.

The Defendant has another answer to this part of the case. Such a provision as is said to here exist would clog the equity of redemption, and must be rejected on that ground. I do not intend to dwell on the older or more recent authorities which were cited on this point; but it is urged that *Mainland* v. *Upjohn* (2) is more properly applicable to the case before me, and it must therefore be noticed. I have carefully considered the Lord Justice *Kay's* judgment, and am satisfied that he did not intend in the slightest degree to depart from the rule of equity established by the authorities to which I have referred, including *James* v. *Kerr* (3), which was decided by himself, and has since been recognised by the House of Lords in *Salt* v. *Marquess of Northampton* (4). *Mainland* v. *Upjohn* established what had already been decided by Vice-Chancellor *Kindersley* in *Potter* v. *Edwards* (5), that where the initial transaction between mortgagor and mortgagee amounts in fact to this—the payment by the mortgagee of the whole amount of the advance to the mortgagor, and the return by the mortgagor of a certain part of it by way of commission to the mortgagee (there being no surprise or unfair dealing), the whole amount is recoverable under the mortgage, and the commission must not be deducted. I do not myself think that this can properly be styled an exception to the rule of equity above mentioned; but, if it can, it is only in the sense that the exception proves the rule—*Exceptio probat regulam.*

(1) 44 Ch. D. 524.
(2) 41 Ch. D. 126.
(3) 40 Ch. D. 449.
(4) [1892] A. C. 1.
(5) 26 L. J. (Ch.) 468.

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The only other point is this. Accounts were from time to time stated, settled and signed; and it is urged that they cannot now be opened. They must, I think, be treated as settled accounts; and, so far as they can be opened at all, it can only be by liberty to surcharge and falsify as regards certain items or classes of items. But it is said that this ought not to be done at all; and the Plaintiff relied for that purpose on *Blagrave* v. *Routh* (1). In my opinion, the judgment of the Lord Justice *Turner* does not apply to a case of this character. The evidence fails to prove, and the circumstances and documents do not justify the inference, if inference would suffice, that the Plaintiff solicitor-mortgagee explained to Mrs. *Wynn-Mackenzie* her true position and legal rights, or that she ever understood that she was entitled to call in question, not the amount of the charges, but the principle of any charges being made at all. Affirmation of items of charge made in ignorance that any charge at all might be contested cannot be regarded as conduct precluding the lady, or the Defendant as representing her estate, from now putting the principle in contest. Mr. *Eyre* did not mean to deceive. He intended his dealings, including those charges, to be fair; but he must take the consequences of not having explained to his client that she might, if she pleased, take exception to them.

The action is one commenced by writ, and the order to be now made on the summons adjourned into Court must take such form that it will direct proper accounts as between Plaintiff and Defendant, dispense with any other trial of the action, and reserve further consideration. The better plan will be to make declarations or expressions of the opinion of the Court on the several points with which I have dealt, and then give liberty to the Defendant to surcharge and falsify the otherwise settled accounts on that footing.

It is impossible for me to say now to what extent the order will be useful to the Defendant, and how far, if at all, unnecessary expense has been occasioned by this discussion. I shall, therefore, reserve all questions of costs until after the account has been taken.

(1) 8 D. M. & G. 620.

*Warmington*, Q.C.:—

Since, during a portion of the period covered by the mortgage transactions, the Plaintiff had a partner or partners, I ask your Lordship to follow the rule laid down by Mr. Justice *Stirling* in *In re Doody* (1), which I mentioned in my opening and was not observed upon or questioned by the other side, namely, that a partner of the solicitor-mortgagee is not precluded from receiving remuneration for his trouble.

*Marten*, Q.C.:—

There is no evidence as to what shares in the business or profits the Plaintiff's partners were entitled to, or whether they were more than salaried partners; nor is the point now mentioned raised by the summons. I therefore submit that it cannot now be entertained.

*Warmington*, Q.C.:—

I suggest that there should be an inquiry as to the shares of the partners in respect of which charges might be allowed, as in *In re Doody*.

KEKEWICH, J.:—

The point now raised, though mentioned by Mr. *Warmington* in his opening, was certainly not argued. The question is whether the order should not be framed in such a way as to allow the partners their proper shares of the costs according to the principle of *In re Doody*, if that principle is a right one to follow. In that case there was an appeal from part only of Mr. Justice *Stirling's* judgment, his judgment on this particular point not being appealed from. This circumstance gives sanction to that part of the judgment which was not appealed from. I have not now before me sufficient materials on which I can direct an allowance of any portion of these costs, but there is evidence before me that Mr. *Eyre* had partners during part of the period covered by the mortgage transactions. The minutes should therefore contain a clause—either in the form of an inquiry

(1) [1893] 1 Ch. 129.

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whether any charges should be allowed, or otherwise as the Plaintiff may be advised—adapted to Mr. Justice *Stirling's* ruling in *In re Doody* (1). The point can then be discussed hereafter, if necessary.

Solicitors: *G. L. P. Eyre & Co.; A. H. Burns.*

(1) [1893] 1 Ch. 129.

G. I. F. C.

# *In re* SOMERSET.
# SOMERSET *v.* EARL POULETT.

[1892 S. 748.]

C. A.
1893
KEKEWICH, J.
*March* 9, 14; *April* 12.
C. A.
*Oct.* 27, 28, 30; *Nov.* 9.

*Trustee—Breach of Trust—Improper Investment—Extent of Liability—Lapse of Time—Action by Cestui que Trust—Statute of Limitations—Impounding Interest of Beneficiary—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 4, 5, 6, 8.

The effect of sect. 8 of the *Trustee Act*, 1888, is that any action or proceeding to recover money or other property from trustees (being one to which no *Statute of Limitations* existing at the passing of the Act applies) is to be brought within six years from the time when the right of recovery accrued.

In August, 1878, the trustees of a settlement committed an innocent breach of trust by investing trust money upon mortgage of property of insufficient value. The mortgagor paid the interest on the money advanced direct to the tenant for life until 1890.

In 1892 the tenant for life and the infant remaindermen brought an action against the trustees to compel them to make good the amount of the investment. It was conceded that so far as the infant Plaintiffs were concerned the trustees were liable to make good the loss to the estate:—

*Held*, by the Court of Appeal (affirming the decision of *Kekewich*, J.), that the right of action by the tenant for life against the trustees was barred after six years from the time when the investment was made; and that, although the payment of interest by the mortgagor direct to the tenant for life amounted in law to a payment by him to the trustees, and by them to the tenant for life, it was not an admission or acknowledgment which would take the case out of the statute.

In order to make a beneficiary liable under sect. 6 of the *Trustee Act*, 1888, in respect of an improper investment, it must be shewn not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust.

An investment of trust funds on mortgage of property of insufficient value was made by trustees at the instigation and request and with the consent in writing of the tenant for life; but it did not appear that he intended to be a party to any breach of trust, or to an investment on the property without inquiry, and in effect he left it to the trustees to determine whether the investment was a proper one for the moneys proposed to be advanced:—

*Held*, on the evidence, by the Court of Appeal (reversing the decision of *Kekewich*, J.), that the trustees were not entitled under sect. 6 of the *Trustee Act* of 1888 to have the life interest of the tenant for life impounded by way of indemnity to them against their liability for the loss to the estate by reason of the improper investment:

And *held*, also, that during the life of the tenant for life he was entitled

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to receive the income of so much of the trust fund as was not lost, and the trustees were entitled to retain for their own use the interest of the money paid by them to make good to the trust fund the amount of the loss.

*Per Kekewich*, J.:—The words "believed to be" in sect. 4 of the *Trustee Act*, 1888, do not govern the words "instructed and employed independently of any owner of the property;" and, therefore, in order to entitle a trustee lending money on the security of property to the protection of the section, he must be able to shew that the surveyor or valuer on whose report he acted was in fact so instructed and employed.

By an indenture of settlement dated the 24th of December, 1875, and made between the Plaintiff, *Vere F. J. Somerset*, of the first part, his wife (then *A. C. Hill*, spinster) of the second part, and the Defendants, Earl *Poulett*, Lord *Dorchester*, and Sir *Thomas Meyrick*, and *Granville R. H. Somerset* (since deceased), of the third part, being the settlement made on the marriage of *Vere Somerset* and his wife, certain stocks, funds, and securities, which had been transferred to or were standing in the names of the Defendants and *Granville Somerset*, were settled upon trust, that the trustees should either permit the funds to remain in their actual states of investment, or with the consent in writing of *Vere Somerset* and his wife during their joint lives, and after the decease of either, with the consent in writing of the survivor of them, during his or her life, convert the same into money, and invest the moneys upon (*inter alia*) Government, or real, or leasehold securities in *England*, *Wales*, or *Ireland*, either subject or not subject to prior mortgages and incumbrances, and the trustees were to stand possessed of the trust funds on the usual trusts in favour of *Vere Somerset* and his wife successively for life, and after the decease of the survivor, for their children, as they or the survivor should appoint, and in default of appointment for the children equally.

*Vere Somerset's* wife died in October, 1889. There were issue five children of the marriage, the infant Plaintiffs.

The funds comprised in the settlement included some Russian and Brazilian bonds, and in the autumn of 1876 *Vere Somerset* became desirous that these investments should be realized, and the proceeds invested on mortgage at 4 per cent. interest of an estate known as the *Hawkestone* estate belonging to Viscount *Hill*, and a correspondence in reference to such investment took place

between Mr. *Jenkyn*, then solicitor for *Vere Somerset* and the trustees, Mr. *Haste* the agent of Lord *Hill*, Lord *Hill* himself, Colonel *Hill*, who was the father-in-law of *Vere Somerset*, *Vere Somerset* himself, and Messrs. *Wilde, Berger & Co.*, the solicitors for Lord *Hill*.

It was made a condition of the proposed mortgage on the part of Lord *Hill* that his solicitors should act for all parties, and Mr. *Berger*, of the firm of *Wilde, Berger & Co.*, accordingly acted in the matter. The facts attending the negotiation for the proposed advance are stated in the judgment of Mr. Justice *Kekewich*, and it is sufficient here to mention that *Vere Somerset* and Lord *Hill* were alike desirous that the advance should be made; that *Vere Somerset* (who was acquainted with the *Hawkestone* estate, of which the trustees did not appear to have any knowledge) took an active part in the negotiation; and that the Defendants, who were not specially desirous to make the proposed investment, relied on the advice of *Granville Somerset*, who was then a member of the Bar, and afterwards one of Her Majesty's counsel, and had large experience in landed estates.

A temporary advance upon the proposed security having been made by the trustees, Messrs. *Wilde, Berger & Co.* instructed the firm of *Farebrother, Ellis, Clark & Co.* to make a valuation of the *Hawkestone* estate with a view to the proposed investment. The instructions given comprised particulars and plans of the property, and stated as follows: "The whole of the above properties are held by yearly tenants and are subject to mortgages to clients of ours for £20,700 at 4 per cent. The mortgagees are desirous of advancing a further sum upon the same security. Messrs. *Farebrother, Ellis, Clark & Co.* are requested to inspect the above farms and report as to the value of them. They are also requested to advise the mortgagees, who are trustees of a marriage settlement, what additional sum they may properly advance to Viscount *Hill* upon the security above mentioned." With these instructions was sent a letter, dated the 18th of June, 1878, from Messrs. *Wilde, Berger & Co.* to Sir *John Ellis* (then Mr. Alderman *Ellis*), of the firm of *Farebrother & Co.*, in the following terms:—

"We send herewith instructions for a valuation and plans of

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the property, and shall be obliged if you will write to Lord *Hill's* agent, Mr. *E. Haste, Weston, Shrewsbury*, and arrange with him for inspecting the property.

"It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured, and we shall be much obliged if you will let us have your report as soon as you conveniently can."

In pursuance of these instructions Sir *John Ellis* made a valuation and a report, from which it appeared that the value of the property was £42,750 and the actual rental £1180. It was stated in the report that the tithe and land tax, amounting to about £111, were payable by the landlord, but no deduction from the rental in respect of these sums was made. The report was accompanied by a letter of July 8th, 1878, from Messrs. *Farebrother & Co.* to Messrs. *Wilde & Co.* as follows:—

"We have the pleasure to hand you enclosed our report as to the value of the estates in *Shropshire*, which we were instructed to survey. We have not stated any amount which we think might be advanced, as to a very great extent it depends on the circumstances of the parties; say, for instance, that the borrower is a man (independently of the estate now being valued) possessed of a very large amount of property, we need hardly say that it is within the bounds of prudence to advance to such a man a much higher proportion of the value than to some one whose whole possessions are the subject of the mortgage.

"We think, however, that fully three-fourths might be advanced."

On the 10th of July, 1878, Messrs. *Wilde & Co.* wrote to *Vere Somerset* as follows: "The land belonging to Lord *Hill*, upon which it is proposed to invest a portion of your settlement money, has been surveyed by a valuer, and according to his report the sum of £30,000 may be advanced. £12,200 of this sum has already been advanced, and we now enclose an authority to the trustees for the signatures of yourself and Mrs. *Somerset* to enable them to sell out sufficient of the securities to raise the remaining sum of £17,800." And on the same day the same firm wrote to *Granville Somerset* as follows: "We send a copy of the report

and valuation of the lands belonging to Viscount *Hill* upon which it is proposed to invest a portion of Mr. *Vere Somerset's* settlement money. This valuation has been obtained by us on behalf of the trustees, and from the reports you will see that the value of the lands is put at £42,750, and we think, according to the valuers' advice, a sum of £30,000 may be safely advanced. £12,200 of this sum has already been advanced, and we now enclose an authority to the bankers for your signature, to enable them to sell out sufficient of the securities to raise the remaining sum of £17,800. We have forwarded the necessary authority to Mr. *Vere Somerset* for the signatures of himself and Mrs. *Somerset* requesting the trustees to sell. If you will send on the papers and this letter to Lord *Dorchester*, and request his Lordship to sign the authority and return the papers to us, it will save time."

Lord *Hill*, who desired to borrow £35,000, was dissatisfied with the valuation and report, and Sir *John Ellis* was again referred to; and on the 17th of July, 1878, having reconsidered the matter, he wrote to Messrs. *Wilde & Co.* as follows: "We have again considered the value of the properties referred to in our report to you of the 8th July instant, and looking at the great value that is attached to the several farms, from the position in which they are placed with reference to other lands, and to the largely increased rent which there is no doubt they would command, if his Lordship would allow fresh arrangements to be made with the tenants, we think there is no doubt but that they represent a sufficient security for an advance of thirty-five thousand pounds (£35,000) to his Lordship."

On the same day Messrs. *Wilde & Co.* wrote to *G. Somerset* as follows: "Since writing to you on the subject of the proposed loan of £30,000, we find that Mr. *Vere Somerset* is desirous that as much of his trust funds as can properly be advanced may be lent on mortgage to Lord *Hill*, and also that his Lordship wishes to borrow at 4 per cent. as much as the trustees can be advised to lend, in order to pay off other advances at a higher rate of interest. Under these circumstances we have communicated with Messrs. *Farebrother, Ellis, Clark & Co.*, the valuers employed on behalf of Mr. *Somerset's* trustees, and we enclose a letter from them shewing that £35,000 may be safely advanced.

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"The total amount of the mortgage to the trustees will, therefore, be for £35,000 at 4 per cent.

"We enclose an order for your signature, to enable the additional £5000 to be raised, and shall be obliged if you will send it on to Lord *Dorchester* with this letter and that of Messrs. *Farebrother & Co.*, and request his Lordship to return the last-mentioned document, with the order for signature, to us."

The trustees, with the consent in writing of *Vere Somerset* and his wife, advanced the sum of £34,612, being the whole amount of the trust fund available for the purpose, on the security of three several mortgages of the *Hawkestone* estate, dated respectively the 15th of May, 1878, the 23rd of August, 1878, and the 24th of August, 1878, and respectively carrying interest at 4 per cent. per annum.

On the 23rd of March, 1881, *Granville Somerset* died.

Down to the 24th of August, 1890, the interest on the loan was punctually paid by Lord *Hill*, the mortgagor, direct to *Vere Somerset* as tenant for life under the settlement. The interest, however, which became due on the 24th of February, 1891, not having been paid, and Lord *Hill* having commenced to cut down and remove timber from the mortgaged property, the Defendants, on the 26th of May, 1891, commenced an action of *Earl Poulett* v. *Viscount Hill* [1891 P. 1223] against Lord *Hill*, to enforce their securities. This action is referred to in the case of *Earl Poulett* v. *Viscount Hill* [1892 P. 2189] (1).

The present action was brought by *Vere Somerset* and his infant children, as Plaintiffs, against the three trustees, as Defendants, alleging that the *Hawkestone* estate was an insufficient and improper security, and claiming a declaration that the investment of the £34,612 was a breach of trust, and that the Defendants were jointly and severally liable to make good to the trust estate the £34,612 and interest, and relief consequent upon such declaration.

The Defendants, by their statement of defence, as against *Vere Somerset* claimed the benefit of the *Trustee Act*, 1888, and all other statutes of limitation, in bar of his alleged right of action, and insisted that if, as between themselves and any of the

(1) [1893] 1 Ch. 277.

Plaintiffs, they should be held liable to make good the £34,612 and interest, or any part thereof, they (the Defendants), having regard to the *Trustee Act*, 1888, and the general doctrines of the Court, were entitled to be indemnified by *Vere Somerset* in respect of such liability, and that his whole interest in the funds subject to the trusts of the settlement, ought to be impounded for that purpose (1).

(1) The following are the material provisions of the *Trustee Act*, 1888:—

Sect. 4: "(1.) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend."

Sect. 5: "(1.) Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

"(2.) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act."

Sect. 6: "(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

"(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

Sect. 8: "(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was

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The action came on for hearing before Mr. Justice *Kekewich* on the 9th of March, 1893.

The action was heard with witnesses, the effect of whose evidence sufficiently appears from the judgments.

*Warmington*, Q.C., and *O. L. Clare*, for the Plaintiffs:—

We charge the Defendants, the trustees of the settlement, with a breach of trust, in having advanced the trust funds on insufficient security, and without a proper valuation. The general rule under which trustees are prohibited from making hazardous, speculative or other improper investments is stated by Lord *Watson* in *Learoyd* v. *Whiteley* (1), by Lord *Herschell* in *Rae* v. *Meek* (2), and by Lord Justice *Cotton* in *In re Salmon* (3). In the present case the advance made was excessive, whether regard were had to the capital value as found by the valuer's report, or to the amount of the rental. In fact, the amount advanced was equal to thirty years' purchase of the gross rental. The Defendants, therefore, independently of the *Trustee Act*, 1888, are liable to replace the entire amount advanced by them.

The Defendants rely on sect. 4 of that Act, and claim indemnity under sect. 6. But sect. 4 clearly cannot be any protection to

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party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a.*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b.*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(1) 12 App. Cas. 727, 733.
(2) 14 App. Cas. 558, 569.
(3) 42 Ch. D. 351, 367.

them. They fail to bring themselves within that section; first, because they did not act upon the report of a surveyor "instructed and employed independently of the owner of the property," but upon the report of a surveyor instructed by the solicitors of the mortgagor; and secondly, because the amount advanced exceeded two-thirds of the value as stated in the report which they obtained. Sect. 6 is not applicable, because the tenant for life only consented to a proper advance being made, and had no knowledge of the circumstances constituting the advance a breach of trust.

*Marten*, Q.C., and *Carson*, for the Defendants:—

The employment of the solicitors of Lord *Hill* to be solicitors for the trustees in the matter of the loan was perfectly *bonâ fide*, and with no sort of idea that they would be subject to any influence adverse to the *cestuis que trust* under the settlement and in favour of Lord *Hill*. *À priori* it is not a breach of trust for a trustee lending money on security to employ the solicitor to the borrower. No doubt in such a case the solicitor has a double duty to perform, and there is inconvenience in that. But the interests of mortgagor and mortgagee are not necessarily so antagonistic as to render it impossible that the solicitor should hold an even hand; and there is no evidence here to shew that Messrs. *Wilde & Co.* did not act with perfect impartiality. The double position occupied by the solicitor cannot affect the independence of the valuer, who acts on the instructions given to him. In the present case the valuer was "instructed and employed independently of any owner of the property" within the meaning of sect. 4 of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59). The section is complied with if the owner of the property has no hand in giving the instructions to, or the employment of, the valuer. The section further requires that the loan is to be made "under the advice of the surveyor or valuer expressed" in his report.

[KEKEWICH, J.:—The instructions must be read together with the letter of the 18th of June, 1878, stating the desire of both mortgagor and mortgagees that as much money should be advanced as the valuer could advise would be properly secured.]

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No doubt; but the statement of that desire does not detract from the independence of the valuer. It is the advice of the valuer which is required by the section to be independent. He was not told to favour Lord *Hill*, nor to do anything except for the purpose of guiding the intending mortgagees.

But further, in order to comply with sect. 4, it is not necessary that the valuer or surveyor should in fact be instructed and employed independently of the owner; it is sufficient if he is a person whom the trustee reasonably believed to be so instructed and employed. That is the true grammatical construction of the clause which, it is submitted, deals only with the fact of reasonable belief.

As the amount of the loan exceeded two equal third parts of the value of the property as stated in the report, the Defendants must, no doubt, so far as the question of amount is concerned, go outside sect. 4, and stand on the protection of sect. 5, and on the general law.

Upon the general law, the question is whether the trustees exercised a *bonâ fide* discretion in making the advance. There is no absolute rule prohibiting trustees from advancing more than two-thirds of the value: *In re Godfrey* (1); *Re Pearson* (2). *Learoyd* v. *Whiteley* (3) is useful as containing, in the words of Lord *Watson*, a summarised statement of the law, adopted in or borne out by *Rae* v. *Meek* (4); *Knox* v. *Mackinnon* (5); and *In re Salmon* (6); but the actual decision in *Learoyd* v. *Whiteley* was in reference to an advance of trust money on mortgage of brickworks, a speculative security objectionable by its very nature. At the time when this transaction was effected, agricultural land was regarded as a permanent security of the very highest class. It is only by the light of subsequent experience that it has been shewn to be a highly artificial thing, requiring almost as much care and attention as machinery.

[KEKEWICH, J.:—I must regard landed property as an excellent investment. The question is whether the trustees in this particular case acted with reasonable prudence.]

(1) 23 Ch. D. 483.
(2) 51 L. T. (N.S.) 692.
(3) 12 App. Cas. 727.
(4) 14 App. Cas. 558.
(5) 13 App. Cas. 753.
(6) 42 Ch. D. 351.

The actual advance was made on the letter of the 17th of July, 1878, from which it appeared that the property was let at insufficient rents, and that a largely increased rental could be obtained. The trustees were acting with the full consent of the tenant for life, on behalf of himself and his infant children, and were justified in relying on the opinions of their experienced valuer and of Mr. *Granville Somerset.*

Assuming, however, that the amount advanced was so excessive as to render the Defendants liable under the general law, they are protected by sect. 5 of the Act of 1888 from liability beyond the excess of the amount which was actually advanced over that which might properly have been advanced. Upon the evidence it is submitted that £28,500 at the least might have been advanced with propriety. Sect. 5 must be read together with sect. 4, and the investment must therefore be treated as a proper investment in all respects except as to the amount advanced.

Then, as against the tenant for life, the Defendants rely on sects. 8 and 5 of the same Act. By sect. 8, sub-sect. 1 (*b*), the claim of the tenant for life is barred, because more than six years have elapsed since the time when the advance was made, and that is the period of time from which the statute will run. This was established in the case of solicitors by *Howell* v. *Young* (1), and *Smith* v. *Fox* (2), under the old *Statute of Limitations,* and by *In re Bowden* (3); *In re Swain* (4); *Want* v. *Campain* (5), under the *Trustee Act,* 1888. In *Howell* v. *Young* it was held that an action against a solicitor for negligence was barred after the lapse of six years from the time when the negligence was committed, though it was not discovered by the plaintiff until a later date, and in *Want* v. *Campain* Mr. Justice *Wright* held that an action by the tenant for life was barred after six years under the recent statute, notwithstanding that interest had been received by her until shortly before the issue of the writ, and that the right of action of the remainderman still subsisted. It is true that in *In re Swain* Mr. Justice *Romer* is reported as saying, "the action is barred in six years from the time when

(1) 5 B. & C. 259.
(2) 6 Hare, 386.
(3) 45 Ch. D. 444.
(4) [1891] 3 Ch. 233.
(5) 9 Times L. R. 254.

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the loss occasioned by the breach of trust occurred," but the point of time was in that case of no importance to the decision, and the observation seems to have been made *per incuriam.*

Under sect. 6 of the same Act the Defendants, if liable for a breach of trust, are entitled to such order as to the Court shall seem just for impounding the interest of the tenant for life in the trust estate by way of indemnity to the trustees. It is clear that he consented in writing to the investment now in question, and that alone is sufficient to bring the case within the section, without evidence of knowledge on his part that the investment was a breach of trust. It is, however, proved that he was fully aware of all the circumstances, that the investment was made at his request and instigation, and that he took an active part in the negotiation of it. Messrs. *Wilde & Co.* acted for him, and their knowledge must be imputed to him: *Bradley* v. *Riches* (1). It must be taken that he was apprised of all those facts which it would have been the duty of solicitors to lay before counsel in a case for his opinion as to the propriety of a change of investment. The policy of the *Settled Land Act*, 1882, was to place the responsibility in the hands of the person who has the active management of the settled property, and to place the tenant for life in the position of a trustee, and the *Trustee Act*, 1888, is an extension of that policy. There is no reason why the tenant for life should, in respect of knowledge, be in a better position than the trustees.

The section is a beneficial one, and the operation of it ought not to be restricted: *Griffith* v. *Hughes* (2), disapproving *Ricketts* v. *Ricketts* (3), which last case, however, is not in point, as there the relief was refused on the ground that the trustees knew that the beneficiary was a married woman.

*Warmington*, in reply, was called on as to the amount of the trustee's liability and the position of the tenant for life:—

The *onus* is on the Defendants, to bring themselves within those provisions of the *Trustee Act*, 1888, which are exceptions from the general liability imposed by law. Under the general

(1) 9 Ch. D. 189. (2) [1892] 3 Ch. 105.
(3) 64 L. T. (N.S.) 263.

law, as under sect. 4, their case breaks down, because there was no valuation on which any advance was made; the only valuation was one upon which the advance was not made. The interpretation of sect. 4 which has been suggested is contrary to your Lordship's decision in *In re Walker* (1), where it was held that the words "reasonably believed to be" referred only to the words which immediately follow them, and did not govern the subsequent words "instructed and employed independently of any owner of the property." As the Defendants have not the protection of sect. 4 they cannot, under sect. 5, derive any aid from the wording of sect. 4, but must be dealt with according to the general law. It cannot be said that this is a proper investment in all respects, except as to the amount, inasmuch as it was improper for the trustees to act in any way upon the valuation which they had received. Trustees can never be justified in lending money on any investment into which the personal security of the borrower enters as an ingredient. There is no evidence before the Court that this would have been a proper investment for £28,500, or any other sum.

Sect. 6 of the Act of 1888 has no application whatever to the present case, because Mr. *Vere Somerset* never was a consenting party to a breach of trust. He had a right to assume that what Mr. *Berger* did was rightly and properly done, and there was nothing to raise the least suspicion on his part that the transaction was not perfectly regular. He never consented to any other than a proper investment. If he had been told that it was a mere land speculation, and that the value of the property was disproportionate, and had no direct relation to the actual rental, he would never have given his consent.

[KEKEWICH, J.:—I am not aware of any case in which the liability of the trustee has been put upon income only.]

In *Learoyd* v. *Whiteley* (2), both in the Court of Appeal and in the Court below, it was mentioned that there was no present income.

[KEKEWICH, J., referred to *Fry* v. *Tapson* (3).]

(1) 59 L. J. (Ch.) 386; 62 L. T. (N.S.) 449.

(2) 33 Ch. D. 347; 12 App. Cas. 727.

(3) 28 Ch. D. 268.

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There can be no consent within the meaning of the section without knowledge on the part of the person consenting. The ignorant cannot consent or acquiesce. The words of the section are "instigation," "request," or "consent," and for each of these three alike knowledge is as necessary as it is to establish acquiescence under the general law: *De Bussche* v. *Alt* (1).

Nor does sect. 8 of the Act apply as against the tenant for life in the present action. By sub-sect. 1 (*b*), the lapse of time is to be pleaded as a bar as if the claim had been "in an action of debt for money had and received." From the time of Lord *Mansfield* there has been an equitable action for money had and received. The *cestui que trust* could not sue, unless he got an admission from the trustee, but if he got that admission, he could sue, and the *Statute of Limitations* applied to the action and ran from the time when the money was received to the use of the Plaintiff. Treating this action as analogous to an action for money had and received, there could be no right to sue until default made, that is, until the trustees failed to do their duty in paying the interest to Mr. *Vere Somerset*—an event which did not occur until 1890. It is said that *Want* v. *Campain* (2) is a decision to the contrary, but that case is very imperfectly reported; and it would seem that the relief there granted was under sect. 6, and that sect. 8 was not relied on or required.

[*Eastwick* as *amicus curiæ*, said that he was counsel in the case of *Want* v. *Campain*, that it was in fact decided under sect. 8, that Mr. Justice *Wright* distinctly held that the payment of interest did not prevent the statute from running against the tenant for life, and that *In re Bowden* (3); *In re Swain* (4); and *In re Page* (5), were cited to his Lordship.]

Even if the statute be held to run from the time when the investment was made, the payment of interest by the trustees to the tenant for life is an acknowledgement that will take the case out of the statute. The language of Lord Justice *Fry* in *In re Bowden* shews that an acknowledgment will defeat a plea of the statute in such an action as the present. The case

(1) 8 Ch. D. 286, 313.
(2) 9 Times L. R. 254.
(3) 45 Ch. D. 444.
(4) [1891] 3 Ch. 233.
(5) [1893] 1 Ch. 304.

of *Howell* v. *Young* (1) has no application. It was an action for negligence, which is in no way analogous to an action of debt for money had and received.

*Marten*, in reply on the cases:—

The payment of interest could not be an acknowledgment of the breach of trust, nor indeed at all as against the trustees, for it was the payment of the mortgagor and not theirs. In *Hughes* v. *Twisden* (2) interest was paid, but the remedy for damages was nevertheless held to be barred. The action is substantially for damages for a wrongful act, which was committed when the money was wrongfully paid away as alleged.

A valuation for £42,750 has been fully established in evidence, and the investment ought to be treated as a proper one for two thirds of that amount, *i.e.* £28,500.

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At the conclusion of the arguments, I observed that this was one of the most difficult, and probably the most important, of pure Chancery cases, that had come before me as a Judge. Reflection has confirmed that impression. The general law, perhaps, is not now so difficult as formerly, because it has been fully expounded in several authorities, to some of which I must presently refer, and particularly by one emanating from the highest Court in the realm; but, notwithstanding the *Trustee Act*, 1888, it is of vast importance, and the ever-changing scenes of life constantly present it under new aspects and raise new points of interest. This case itself is an illustration of such varieties. Further difficulties are introduced by the statute, and I can conceive no subject of deeper interest to trustees, or to those who have to advise them or conduct their cases, than the proper construction and application of its provisions. I have, therefore, reflected on the arguments in this case, and studied the facts, documents and authorities, with the utmost devotion of which I am capable, and with earnest anxiety to arrive, if possible, at a right conclusion on all and every the main points requiring consideration. In my judgment, which will run to some

(1) 5 B. & C. 259. (2) 55 L. J. (Ch.) 481; 54 L. T. (N.S.) 570.

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—perhaps too great—length, I shall have occasion to mention some of these facts, documents, and authorities. I could not mention all without even greater prolixity, and it is possible that some may be omitted which ought to be noticed; but they have been studied and weighed, and if some have failed to influence me as they ought, it is not because the opportunity has not been afforded.

Before determining, and in order to determine, the main points arising under the *Trustee Act*, 1888, it is necessary to consider to what extent and on what grounds the Defendants can be held liable independently of that statute, that is, under the law previously existing. And for this purpose it will be convenient to state shortly what I conceive to be that law, so far as it is applicable to the case in hand. It may be taken to be settled (see *Speight* v. *Gaunt* (1); *Learoyd* v. *Whiteley* (2)), that trustees must exercise in the discharge of their duties ordinary care and prudence, by which is meant such care and prudence as a reasonable man would exercise in the management of his own private affairs, and that so long as they do this, and act within the limits of their legal powers, they cannot be made liable for loss even though incurred by what turns out to be a failure in discretion. Further, generally speaking, but subject possibly to some limitation, it may be taken to be settled that the liability of trustees as regards any particular transaction is not increased by reason of the fact that one of their number is skilled in the business with which that transaction is concerned. As regards investments on mortgage, it is the duty of trustees to conclude for themselves, and by the exercise of their own judgment, whether any given security is sufficient for the amount which they propose to advance against it; and this holds good notwithstanding that the surveyor, solicitor, or other trusted agent expressed an opinion on the subject. There is no absolute rule respecting the choice of security falling within the strict limits of authorized investments, or the amount proper to be advanced against any particular security; but *Learoyd* v. *Whiteley* is a warning to trustees that land devoted to trade may not be regarded as a proper security at all, and the same case

(1) 9 App. Cas. 1. (2) 33 Ch. D. 347; 12 App. Cas. 727.

combined with others (see, for instance, *Fry* v. *Tapson* (1)), shews, that there are undefined but fairly well understood limits beyond which advances ought not to be made. Lord *Watson*, says (2), that these limits must be understood as indicating the lowest margins, which, under ordinary circumstances, a careful investor of trust funds ought to accept; and if, on the one hand, that implies that under special circumstances those margins need not be observed, it equally implies that it may not be safe to be content with them. In order to fix the limit of advance in any particular case, it is necessary for trustees to be advised respecting the value of the property, and unless they themselves are personally acquainted with it, they must also be advised respecting the character of the property, and the probability of its continuing to be a proper trust security. The object of trustees must ever be to make a permanent investment, that is, one which will be maintained for a considerable period, and which will not only during that period yield the stipulated income, but will ultimately and whenever required, realize the full sum advanced. In *Learoyd* v. *Whiteley* (3) the Lord Chancellor dwells on the importance of securing the capital sum, but did not, I am convinced, intend to place in the background the importance of also securing the income, which may be and often is as essential to the welfare of the remainderman as it is to that of the tenant for life. Trustees, therefore, must regard any advice given to them respecting value from this double point of view, and cannot be absolved from liability for loss arising on a particular transaction by shewing that their advance was within the allowed limits as regards capital, if they were exceeded as regards income, and the income was insufficient to pay the stipulated interest. I express myself thus, because the limits stated with reference to capital have not been specifically applied to income, and I am not sure that as regards income some larger latitude might not safely be permitted. On the question how far, if at all, trustees may properly rely on the position of the borrower, there is, so far as I am aware, no authority. Men of ordinary care and prudence managing their own affairs would, no doubt, take this into

(1) 28 Ch. D. 268. (2) 12 App. Cas. 734.
(3) 12 App. Cas. 732.

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consideration, and, in the mercantile world, it is frequently treated as equally important with the value of the security. It is impossible, I think, to exclude it from the consideration of trustees, who are bound to have regard to all the circumstances connected with any proposed advance on security, and it would not be difficult to put cases in which the solvency or insolvency of the borrower would properly influence them in making an advance somewhat in excess of the limits generally allowed, or declining the transaction altogether; but where the object is to make a permanent investment of trust money on mortgage of real estate, it seems to me wrong to advance a sum largely in excess of what is otherwise right, because it is believed that the borrower is now, and it is anticipated that he will remain, capable of paying the principal and interest, or such part thereof as cannot be realized from the security. The mortgages of May and August, 1878, impeached in this action, and which for practical purposes may be treated as one transaction, must be examined on these principles.

When, how, and by whom this disastrous mortgage was first suggested does not clearly appear, and is perhaps immaterial. Suffice it to say that in the autumn of 1876 the Plaintiff, Mr. *Vere Somerset*, who was tenant for life of the funds comprised in his marriage settlement, wished to have those investments realized, and the proceeds advanced on the security of Lord *Hill's Hawkestone* estate. It is clear that from the first he desired thus to invest the whole of the trust funds, calculated to be £35,000 sterling, and that in this he was at one with his father-in-law, Colonel *Hill*, and the intended mortgagor, Lord *Hill*. There are expressions in some of the early letters, such as Mr. *Jenkyn's* letter of the 23rd of November, 1876, pointing in this direction, and to the same effect are Colonel *Hill's* two letters of some days in 1878, and Mr. *Haste's* two letters of the 4th of February, 1878. This is important, because it explains a passage in Messrs. *Wilde & Co.'s* instructions to Sir *John Ellis*, which must be mentioned presently. There is no direct evidence of any communication of this to the trustees. It might or might not be right to infer that it was made, but at any rate Messrs. *Wilde & Co.*, who acted both for mortgagor and mortgagee, knew what

was intended, and I must impute to the trustees the information which they possessed. It is not unusual—it is, indeed very usual—for the same solicitor to act on behalf of a mortgagor and mortgagee, and, where the investment is of trust money, to act also for the tenant for life, who has an immediate interest in the investment, and whose consent is generally, as here, required. It is only fair to solicitors to say that this difficult and delicate duty of acting impartially to clients with conflicting interests is generally discharged with perfect fairness, and seldom gives rise to any complaint, but the position is nevertheless an embarrassing one, and when complaint is made, necessarily renders scrutiny of conduct more suspicious. I am particularly anxious to be careful in what I say respecting Mr. *Berger*, who managed the business in the present case, not so much because he is a member of a well-known firm of solicitors, as because he has not had an opportunity in this action of explaining his conduct. I have already said, and I desire to repeat, that I have not a word to say against the discretion of the Defendants' counsel in not calling Mr. *Berger* as their witness. This was a matter entirely for the determination of counsel, and I wish to uphold counsel in the exercise of their discretion. I am quite satisfied that Mr. *Marten* exercised his in the best interests of his client, and experience tells me that some risk of observation must be incurred in the discreet selection or rejection of witnesses. But Mr. *Berger* was not called, and I cannot altogether avoid making remarks which may be disagreeable to him, and to which he possibly has a complete answer. Mr. *Berger* knew that it was a condition of the proposed mortgage on Lord *Hill's* part that his firm should act both for mortgagor and mortgagee. He knew further that Mr. *Haste*, Lord *Hill's* agent, was in communication with Mr. *Vere Somerset*, who over much assumed the position of mortgagee, though his trustees really filled that character, and that Mr. *Haste* apparently acted, as according to Mr. *Vere Somerset's* admission he in truth acted, as agent quite as much for that gentleman as for Lord *Hill*. He also knew that the intended mortgage was to be for as much as £35,000, and that this would be as advantageous to Lord *Hill* as to Mr. *Vere Somerset*. For all this, I need only refer to the correspondence,

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which contains abundant proof, without quoting particular passages. He seems to have assumed that the trustees concurred with Mr. *Vere Somerset* in wishing that the whole trust moneys should be advanced to Lord *Hill* on the security of the *Hawkestone* estate. At least I find in the correspondence no inquiry by him from them, and no statement by them to him contradicting this view. Mr. *Vere Somerset* knew the *Hawkestone* estate. That he was acquainted with the details of the property, or the rentals of the several farms, is not shewn by the evidence, and I do not think was the fact, but he had some knowledge of it, whereas his trustees appear to have had none. This also, I think, must have been known to Mr. *Berger*. It is only fair to the trustees to say that, though in the event they were guided perhaps foolishly, yet not unnaturally, by Mr. *Berger*; and although the other three also not unnaturally relied on their colleague Mr. *Granville Somerset*, who, besides being a member of the bar, is said to have had large experience in landed estates, yet they were by no means eager to embark on this transaction, or to advance the trust money without proper precaution, or on other than good security. I cannot but think that if Mr. *Berger* had stood firm, or if he had pointed out to them the objections to the course pursued, and the risks which they were incurring, they would have drawn back, and would have avoided this litigation. The transaction was nevertheless theirs, and they cannot be heard to say that the instructions given to Sir *John Ellis* were not given on their behalf, or that his advice was not given to them, and did not form the basis of their action. On those instructions, and on that advice, it is now my duty to comment.

On the instructions strictly so-called, I have only two remarks (neither of them of great importance) to make. The statement that the property was then in mortgage to clients of Messrs. *Wilde & Co.* for £12,200 is not explained by the documents or evidence, but it can hardly be material from any point of view, and I pass it by. The request that Sir *John Ellis* would advise the trustees what additional sum they might properly advance to Lord *Hill* on the security offered was so common, and has received such sanction from the Legislature (*Trustee Act*, 1888,

s. 4), that, though in my opinion improper, I will not comment on it. But with the instructions was sent a letter which cannot be thus lightly dealt with. In this letter is this statement, "It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured." I wish to give all due weight to the word "properly," and I will take it to have been intended to have been of the essence of the passage in which it occurs. Nevertheless, I deem that passage to have been wholly wrong. In the first place there is not a tittle of evidence to shew that the mortgagees did desire the advance of as much as could properly be secured. Lord *Hill* did, and Mr. *Vere Somerset* did. But the trustees were the mortgagees, and their desire, if it existed, has not been expressed. Apart from that, the passage starts the valuation on a wrong basis, and suggests to the valuer that he shall at least not err on the side of caution. Sir *John Ellis's* report is contained in two documents; one a valuation, and the other a letter of the 8th of July, 1878. Of the valuation, having seen Sir *John Ellis* in the witness box, and heard his explanation, I need only say that it is a strange instance of the sanguine view of the value of land frequently adopted some years ago, and bitterly negatived by present facts. The letter deals with the amount to be advanced. Sir *John Ellis* practically admitted that three-fourths of any value was a large proportion to advance on real security, and of course it was in excess of what trustees could properly advance under, say, ordinary circumstances, but in the letter he guarded himself by referring to the position of the borrower as possibly influencing the prudence of a large advance. The question is not whether he ought to have said this, but whether the trustees ought to have given any weight to it. If the principles above laid down are as sound as I believe them to be, there is no room for doubt on this point. I conclude from the evidence of the trustees that they all had an opportunity of seeing, and that some of them certainly did see the valuation; I am not sure that they saw the letter, but they were told (see Messrs. *Wilde & Co.'s* letter of the 10th of July, 1878), that according to the report, £30,000 might be advanced, and this is really a trifle less than three-fourths of the value put on the

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property. If the matter had stopped there, that is, if they had advanced £30,000, and no more, they might possibly have saved themselves. It was more, as will be presently seen, than they in my opinion ought to have advanced, but it might not have been held such an imprudence as imposed liability. Unfortunately it did not stop there. It appears that Lord *Hill* was not satisfied. He had always intended to raise £35,000, and knowing that it was Mr. *Vere Somerset's* intention, he was naturally disappointed to find that £30,000 only would be forthcoming. This must have been communicated to Mr. *Berger*, who thereupon saw Sir *John Ellis*. I know from that gentleman, but unfortunately without Mr. *Berger's* correction, what passed at the interview. Sir *John Ellis* considered himself as no longer occupying the position of valuer, but as called in to advise the parties in a friendly manner what might be done; and if the desire mentioned in the letter of the 18th of June, 1878, was not then repeated, as I should infer it was, the letter itself must have been present to his mind. Acting as the friend of the parties—*amicus curiæ*, he styled it—he advised that £35,000 might be advanced. This advice is contained in a letter of the 17th of July, 1878, and is there based not so much on the present value which, be it observed, is not stated to be greater than that fixed by the report, as on the increased rents which, if Lord *Hill* would but sanction it, might in his opinion be obtained. The trustees were informed of this. Whether they all were told how the rise from £30,000 to £35,000 was justified I do not know; but in the letter of the 17th of July, 1878, addressed to Mr. *Granville Somerset*, it was explained in the best possible manner, namely, by enclosing a copy of that received from Sir *John Ellis*. On this the trustees advanced not £35,000, because that full amount was not forthcoming, but £34,612, which I understand to have been all that the trust fund could produce. The impropriety of it is, in my judgment, beyond question. The amount was far in excess of what, according to any rule applied with any latitude or laxity, ought to have been advanced, and it was arrived at by a process unsound in itself, and especially objectionable when applied to the investment of trust funds.

The liability of the Defendants according to law, standing independently of the *Trustee Act*, 1888, being thus established, it remains to consider the several questions arising under that Act. They must be treated separately, and it will be convenient first to take those sections which are said to negative the liability wholly or partially, and afterwards those which are invoked to shew that the liability cannot be enforced by, or is compensated by counter-claim against, one of the Plaintiffs, Mr. *Vere Somerset*. I will not read any section at length, the language being before me as well as before all interested in the case, but particular words and expressions must be noticed and receive some comment.

A question of grammar arises in sect. 4, which is the first to be considered. Mr. *Marten*, who argued this case with even more than his usual industry and ability, almost persuaded me that the words "believed to be" governed "instructed and employed independently of any owner of the property," so that, on the assumption that the trustees were ignorant and not culpably ignorant of any instructions to or employment of Sir *John Ellis* on behalf of Lord *Hill*, they would be entitled to rely on that gentleman's report as to the value of the property, because made by an able practical surveyor or valuer whom they believed to have been instructed and employed independently of any owner of the property. The point has become immaterial, and I need not pursue it further than to say that I remain of the opinion expressed in *In re Walker* (1), that this is not the grammatical or right construction of the section. Such a construction, however, would not avail the Defendants because there was only one report as to the value of the property, and the sum advanced exceeded two equal third parts of that value. This excess is fatal to the Defendants' plea of the 4th section.

As regards the 5th section, the puzzle is not how to construe it, but how properly to apply its provisions to the facts of this case. It seems to suppose that whenever a mortgage security is found to have been a proper investment in all respects for a less sum, there is a possibility of determining what less sum than was actually advanced thereon might have been safely advanced. I

(1) 59 L. J. (Ch.) 386; 62 L. T. (N.S.) 449.

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entertain a strong opinion that if the trustees had acted prudently with reference to Sir *John Ellis's* report (I set aside for this purpose his advice respecting the amount which might be advanced), they would have said that it did not afford materials sufficient to enable them to arrive at a conclusion. They would have observed that the high value placed on the property could not well have been calculated, and Sir *John Ellis* admitted that it ought not to have been and really was not calculated, with reference to the then rental; and further, that the rental certainly did not, and that the value possibly did not, make any allowance for deductions in respect of tithe and land tax, notwithstanding that they were mentioned in the body of the report as falling on the landlord. If, however, they had set themselves to consider as trustees, that is, as men of ordinary prudence, to determine what sum might safely be advanced on mortgage, they would, as I have already endeavoured to explain, have considered the receivable income as much as the capital value, and they would have made an advance calculated on the basis that they might depend on the receipt of interest at, say, 4 per cent. from the actual rental. Seeing that the capital value was large, they might have been justified in not insisting on more than a small margin of rent, but this would have been the extreme limit of prudence. Some margin there must be, to provide against contingencies, including possession and collection. The actual rental was £1180, from which had to be deducted for tithe and land tax £111 odd, leaving, say, a net rental of £1070. If, recognising the investment as a proper one in all respects for a less sum, I am compelled by the language of the section to say what less sum than that actually advanced might have been advanced thereon, I fix the utmost limit at £26,000. In this I am giving a large interpretation to a remedial statute, and treating the trustees with a generosity barely warranted by the materials which the trustees have placed at my disposal. According to the actual and prospective realization of the security, stated to me in the course of the argument, this figure will not be of great practical advantage to them, but they shall have it for what it is worth.

Passing by for the moment sect. 6, I proceed to consider the

question suggested by sect. 8, sub-sect. (*b*). The investment was made in 1878; the writ in this action was issued in 1892, so that if this provision means that the right of action against trustees under such circumstances as here exist shall be barred as against a beneficiary whose interest is in possession at the expiration of six years from the date of investment, Mr. *Vere Somerset's* right to sue is gone, though the trustees remain liable to his infant children. The Plaintiffs' argument was that the principle of *Howell* v. *Young* (1) has no application to such a case as this, and that, according to the words of the statute itself, the action must be treated as one for money had and received, and that, so treating it, the plea cannot be maintained. The meaning of the provision, that is, of the particular language in which the provision is expressed, is not to my mind by any means clear, but I do not think that it means what was contended by the Plaintiffs. It would have been easy, and possibly better, to provide, if that had been the intention, that an action against trustees to recover money or other property to which no existing *Statute of Limitations* applied should be brought within six years from the time when the right of recovery accrued, but notwithstanding that it has not been so plainly provided, that must, I think, be the meaning of the section. I suppose that the words "money had and received" were used because in that particular form of action for debt there was more analogy to pleadings and procedure in Chancery than in any other like action, and in truth an action of that character might have been brought, and sometimes was brought, against trustees in what we now call the Queen's Bench Division before the *Judicature Acts*. The controlling words for the purposes of construction are, I think, "an action of debt," and in such an action a plea that the right accrued six years before writ issued is good, and can only be defeated by acknowledgment or some other act taking the case out of the statute. This apparently was the view of other Judges before whom the section has come, although the precise point either did not arise or was not argued before them. I am referring to *In re Bowden*, before Lord Justice *Fry* (2); *In re Swain*, before Mr. Justice *Romer* (3); *In re Page*, before Mr. Justice

(1) 5 B. & C. 259. (2) 45 Ch. D. 444, 451. (3) [1891] 3 Ch. 233.

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*North* (1); and *Want* v. *Campain* (2), before Mr. Justice *Wright*. The attempted answer is that there has been what has been equivalent to acknowledgment, namely, that from the date of the investment until some time in 1890 the mortgage was treated as good, and interest at the stipulated rate was paid, and the Plaintiffs call in aid of the argument a passage in the judgment of Lord Justice *Fry*, in the case above noticed. The language is this: "If this had been an action for debt, for money had and received, and the debt had arisen more than six years ago, and no acknowledgment had taken place in the meanwhile, the lapse of time would have furnished a defence." I desire humbly to express my entire concurrence with the view of Lord Justice *Fry*, that an acknowledgment suffices to defeat a plea of the statute as much in an action against a trustee, as in any other action for money had and received, but I fail to see how what has occurred here can be regarded as an acknowledgment for this purpose. There has been no concealment, no disclosure of new facts, no payment of interest, except on the basis of a mortgage, the character of which was as well known to Mr. *Somerset* as to the trustees themselves. According to the short report in the *Times* Mr. Justice *Wright* deals with the precise point in *Want* v. *Campain*. He is there reported to have held that a tenant for life was barred by the provisions of sect. 8 now under consideration, notwithstanding the receipt of interest by her until shortly before the issue of the writ, and I follow his decision not merely because he has decided the point (for with so recent a case, not fully reported, before me I might not be justified in doing that), but because it entirely commends itself to my judgment. As against Mr. *Vere Somerset* I must hold that the statute affords a complete answer on the part of the Defendants.

On the application of the 6th section there is little, I may venture to say no, authority. The point, though new, important, and by no means free from difficulty, can be simply stated. Mr. *Vere Somerset* consented in writing to the mortgage made, and it was made at his instigation and request. If that were the only thing required he would certainly be liable to have his life interest

(1) [1893] 1 Ch. 304. (2) 9 Times L. R. 254.

impounded to indemnify the trustees against the loss which they are bound to make good to his children. But the statute contemplates a breach of trust committed by the trustee, and it is of the essence of the section that such breach of trust—nothing more or less—was committed at the instigation or request or with the consent in writing of the beneficiary sought to be charged. It is urged that Mr. *Vere Somerset* never intended to be a party, and was not in fact a party, to a breach of trust. No doubt he intended that the funds subject to the trusts of his marriage settlement should be advanced on the security of this property, and wished the whole of it to be advanced on that security; but he intended his trustees only to advance safely and prudently, and he trusted them, their solicitors, and the valuer employed, to see that all proper precautions were taken to this end. It may be conceded that Mr. *Vere Somerset* did not wish any advance to be made in excess of what would be properly secured. His object was to have the trust funds permanently invested on a good security yielding 4 per cent. interest. And if he had appreciated the risk which was being run, in making so large an advance on such a security, he would have hesitated to give, and I conclude he would not have given, his consent. But he was a party to all that occurred. He conducted the negotiations to some extent himself, and more largely through Mr. *Haste*, who was his agent as much as that of Lord *Hill*, and if he did not actually know as much as was communicated to Mr. *Granville Somerset* respecting the interview between Mr. *Berger* and Sir *John Ellis*, and the friendly advice of the latter which followed that interview, he at least knew that £35,000, or in the event £34,612, was intended to be advanced on the security of property which was yielding only £1070 net income, and that the high value, I will call it no more, of £42,750 left but a trifling margin. If this provision of the statute, which is based on the highest principles of equity long administered by the Court of Chancery, is to be allowed to have any operation at all, it must, I think, be applied to such a case as the present.

My judgment will be to the following effect. There will be a declaration as between the infant Plaintiffs and the Defendants that the investment by the Defendants and Mr. *Granville Somerset* of the £34,612 was a breach of trust, and that the Defendants

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are jointly and severally liable to make good to the trust estate the excess of that sum over the sum actually realized by sale of the mortgaged property, or if it realizes less than £26,000 then the excess over £26,000, which is the largest sum which might properly have been advanced by the trustees on the security thereof. The same Plaintiffs will be declared entitled to a lien on the proceeds of sale of the property already sold and to the property remaining unsold for the payment of this amount. There will be directions for the sale of what property remains unsold, and an inquiry to bring out the ultimate loss for which the Defendants are liable. As between Mr. *Vere Somerset* and the Defendants there will be a declaration that his right to sue is barred by the statute, and, further, that the Defendants are entitled to have his life interest in the whole trust estate whatever it be, impounded by way of indemnity to them against the liability before declared, and proper directions must be given to this end. The Defendants must pay the infant Plaintiffs' costs of action, and the order should provide for the payment of these costs directly to the Plaintiffs' solicitor. This seems necessary because Mr. *Vere Somerset* is the next friend of the infants as well as personally Plaintiff, and there can be no set-off of costs due to and from him. He must pay the Defendants' costs of the action so far as they have been increased by his joining as Plaintiff and seeking relief against the Defendants. These costs must be separately ascertained. There will probably be some other consequential directions, and I gather that it may be as well to appoint new trustees. Mr. *Clare* will be good enough to prepare minutes according to the above judgment with such amplifications and additions as circumstances require.

C. C. M. D.

C. A.

Mr. *Vere Somerset* appealed against so much of this judgment as declared (1.) that his right to sue was barred by the *Statute of Limitations*, and (2.) that the Defendants were entitled to have his life estate in the whole trust fund impounded by way of indemnity to them in respect of their liability to the remaindermen upon the breach of trust.

The appeal was heard on the 27th, 28th, and 30th of October, 1893.

*Warmington*, Q.C., and *O. L. Clare*, for the Appellant:—

We contend that the Appellant's remedy against the trustees is not barred by sect. 8 of the *Trustee Act*, 1888. The trustees paid interest to him under the mortgage till within a year before the issuing of the writ, and this is an acknowledgment which takes the case out of the *Statute of Limitations*. In the case of *In re Bowden* (1), Lord Justice *Fry* intimates a clear opinion that an acknowledgment would stop time from running as in the case of an ordinary debt. In *Want* v. *Campain* (2) Mr. Justice *Wright* took the same view as Mr. Justice *Kekewich* has done in the present case; but we contend that this is against the true view of sect. 8, sub-sect. 1 (*b*). This case is analogous to that of "an action of debt for money had and received" in respect of which there has been an acknowledgment so as to prevent the debt being barred. If *Want* v. *Campain* had been an action at common law for money had and received, the plaintiff, the tenant for life, must have succeeded when interest was paid within six years before the issuing of the writ.

[DAVEY, L.J.:—Can you treat the payment of the interest by the trustee to the tenant for life as an admission that the trustee owes the money? The trustee was only handing over the interest paid by the mortgagor.]

In the case of *In re Swain* (3), there was no question as to the effect of payment of interest, as the estate had been divided more than six years before the action commenced, so that no question as to any exception from the *Statute of Limitations* could arise. So in *In re Page* (4), a residuary legatee, twelve years after coming of age, sued the trustees for an account of the residue which had been expended before he came of age. We contend that the payment of interest makes sect. 8 no defence.

But, whether we are right or wrong upon that, we contend that the Appellant is not liable under sect. 6 to have his life estate impounded. That section applies where a trustee has

(1) 45 Ch. D. 444, 451.
(2) 9 Times L. R. 254; *Seton* on Decrees, 5th Ed. pp. 2127–8.
(3) [1891] 3 Ch. 233.
(4) [1893] 1 Ch. 304.

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"committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary," and provides that in that case the Court may impound the interest of the beneficiary. This can only be held applicable where the beneficiary knows that the act which he requests or instigates the trustee to do, or consents to his doing, is a breach of trust. A beneficiary who asks the trustee to invest a certain sum on a certain security cannot be said to request him to commit a breach of trust unless he knows that the security on which he asks the trustee to invest is an improper one. In order to apply this section you must bring home to the beneficiary knowledge of the facts which make the investment a breach of trust. Here the just inference from the correspondence is that the tenant for life did not know the facts which made the investment on Lord *Hill's* estate improper, and that he relied on the trustees for making all proper inquiries as to the sufficiency of the security. He did not know that the proposed loan was of the whole of Lord *Hill's* fortune. The trustees must justify their departure from the rule as to not advancing more than two-thirds of the value of agricultural property: *Learoyd* v. *Whiteley* (1). As to the effect of sect. 6 of the *Trustee Act*, 1888—which for the first time placed upon the statute book what had up to that time been the rule of the Court—the very essence of it is, that the beneficiary who has instigated, requested, or consented to the breach of trust, knew or might have known that the particular investment proposed was unauthorized. In the earlier cases the Court held that the limit of the impounding was the advantage derived by the beneficiary who instigated the breach of trust: *Raby* v. *Ridehalgh* (2). Under the present section, however, the Court has to exercise a discretion; that is to say, where the beneficiary is instigating on the one hand, and the trustees are consenting on the other, the Court must, in deciding to what extent, if any, the interest of the beneficiary is to be impounded, consider the circumstances of each party and weigh the means of knowledge of each, and then "make such order as shall seem just." Here the evidence shews that the trustees did not commit the breach of trust at the instigation of the Appellant; they made the

(1) 12 App. Cas. 727, 733. (2) 7 D. M. & G. 104, 109, 110.

advance after having themselves obtained the fullest information in their power. The result of the judgment below is to throw the whole loss solely upon the Appellant, although he had not the same means of knowledge as the trustees. That cannot be "just" within the meaning of the section.

*Marten*, Q.C., and *Carson*, for the Respondents, the trustees:—

First, we say that the Appellant is, under s. 8 of the *Trustee Act*, 1888, barred from making any claim against us. His contention is that there has been an "acknowledgment" by payment of the interest by us to him. But such is not the fact: he received the interest from the mortgagor, Lord *Hill*, direct. It is a fallacy to apply the analogy of an action for money had and received to this case. The money was not money in the hands of the trustees at all, but was money invested by them on mortgage, and due to them as a mortgage debt. The interest paid was not interest on the moneys arising from the sale of the securities sold out by the trustees prior to the mortgage, but was interest on the mortgage debt due to the trustees. Therefore interest was not paid in respect of money had and received at all: the "acknowledgment" consisting in payment of interest on the mortgage debt only. Payment of interest, to be an "acknowledgment," must be payment of interest on a sum of money claimed to be in the hands of the alleged debtor; but the money claimed here is money invested on mortgage. To take the case out of the statute the Appellant must shew that the payment which he says was an acknowledgment was made in respect of a debt for money had and received—a debt which we dispute: *Chitty* on Contracts (1). But the payment of interest to the Appellant was in no sense an "acknowledgment"; the trustees were bound to pay it to him; and that payment was merely a handing over to him of money to which he was entitled. For the purpose of acknowledgment by payment, payment by a stranger will not suffice.

With regard to impounding the life interest of the Appellant under s. 6 of the *Trustee Act*, 1888, it is clear that the investment was made at his instigation, or request, or with his consent in

(1) 12th Ed. pp. 816, 817.

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writing. To bring a case within that section it is not necessary that the particular act done should be known to both parties as constituting a breach of trust. The character of the act need not be known to either party; it is sufficient if the act itself is done at the instigation, or request, or with the consent of the beneficiary. *Raby* v. *Ridehalgh* (1), which is very similar to this case, precisely covers it.

[DAVEY, L.J.:—It is popularly supposed that the language of sect. 6 was taken from the law as laid down in that case.]

Here the tenant for life gave his consent to a mortgage which was a breach of trust without satisfying himself that the security was a proper one, and the rule of the Court is that the loss to the trust estate must be first made good out of the estates of the persons who consented to it: *Trafford* v. *Boehm* (2); *Sawyer* v. *Sawyer* (3); *Griffith* v. *Hughes* (4). In this case the settlement prohibits the making of any investment without the consent of the tenant for life, and the person whose consent is required must consider the matter. He is at the very least put on inquiry. It is his own act as to his own money. The knowledge of *Wilde, Berger & Co.* must be imputed to Mr. *Vere Somerset*, and he knew that only one firm of solicitors was being employed in the transaction. *Haste* was his agent, and also the agent of Lord *Hill*. Mr. *Vere Somerset* was in a position to know, and did know, more than the trustees did. He was dealing as an interested party. He was in reality the cause of the breach of trust, or, at all events, privy to it. Our case is brought within both sect. 6 and sect. 8 of the statute, and the discretion of the Court ought to be exercised so as to impound the estate of the interested beneficiary for the protection of the trustees.

*Warmington*, in reply:—

The payment by Lord *Hill* direct to Mr. *Vere Somerset* of the interest which he had covenanted to pay to the mortgagees was made with the sanction of the trustees as a matter of convenience, and the effect is exactly the same as if the mortgagor had paid

(1) 7 D. M. & G. 104.
(2) 3 Atk. 440.
(3) 28 Ch. D. 595, 603.
(4) [1892] 3 Ch. 105.

the interest to the trustees, and the trustees had received it for the use of Mr. *Vere Somerset*, and then paid it to him.

[A. L. SMITH, L.J., referred to *Wainman* v. *Kynman* (1); *Shelford's* Real Property Statutes. (2).]

A trustee is not discharged from doing his duty merely because the consent of the tenant for life is required to an investment. In this case Mr. *Vere Somerset* left, as he was entitled to do, the question of value entirely to the trustees, and he never had the slightest intention to sanction an improper investment.

If the Respondents are right, no tenant for life could safely consent to any investment without being advised by a separate solicitor.

1893. Nov. 9. LINDLEY, L.J.:—

The first question raised by this appeal is whether the *Statute of Limitations* is a bar to the claim of the Plaintiff and Appellant Mr. *Vere Somerset* to have the trust moneys made good?

The second question is whether the trustees who, whether the Plaintiff is barred or not, have to make those moneys good are entitled to have the income from them applied to their own indemnity during the Plaintiff's life?

Both these questions turn on the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), but they turn on different sections of it.

The first question turns on s. 8. [His Lordship then read sub-sect. 1 of that section, and resumed:—]

The breach of trust for which the trustees have been declared responsible is the investment of money on mortgage of property of insufficient value. There has been no fraud, nor any conversion of the trust property to the use of the trustees. They advanced the trust money on mortgage in August, 1878. That was the breach of trust. The mortgagor paid the interest on the money to the Plaintiff as tenant for life until August, 1890; and the action against the trustees was commenced in February, 1892, *i.e.*, more than six years after the investment, but considerably less than six years since the last payment of interest. The

(1) 1 Ex. 118. (2) 9th Ed. p. 224.

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breach of trust is not now in controversy, and it is conceded that the Defendants are liable for it to the infants who are entitled to the funds subject to the life interest of Mr. *Vere Somerset*. The question is as to his right of relief.

The fact that the interest was paid direct by the mortgagor to the Plaintiff as tenant for life, and not by the trustees to him, is in my opinion immaterial. In point of law the payment amounts to a payment by the mortgagor to the trustees pursuant to his covenant, and to payment by them of the money so received to the Plaintiff as tenant for life, pursuant to the trusts which the trustees had undertaken to perform. But then arises the question, What is the effect of such a payment with reference to the *Statute of Limitations*? What does such payment admit? It is not an admission or acknowledgment of any breach of trust, nor of any liability on the part of the trustees that they owe, or are liable to make good, the principal sum to the Plaintiff, or to any other of their *cestuis que trust*; it is a mere acknowledgment that they have received from the mortgagor so much money in respect of his mortgage. But such an admission will not suffice to deprive the trustees of the protection afforded by the *Statute of Limitations*. In applying the analogy of an action for money had and received to the use of the Plaintiff we must not shut our eyes to the truth. We must not first of all treat the trustees as debtors of a sum which they do not admit they owe, and then treat the payment of interest as an acknowledgment that they owe that sum and are liable to make it good. We must look at the facts and see what it is that the payment of interest really does admit and acknowledge, and, unless the facts are such as to justify the inference that the trustees admitted their liability to make good the principal, the payment of the interest will not deprive them of the benefit of the statute. This is conclusively shewn by *Foster* v. *Dawber* (1), *Davies* v. *Edwards* (2), and *Morgan* v. *Rowlands* (3), where the principles applicable to the law on this subject are fully explained. In *Morgan* v. *Rowlands* it was held that payment of interest pursuant to a judgment in an action brought to recover interest only did not prevent the

(1) 6 Ex. 839. (2) 7 Ex. 22. (3) Law Rep. 7 Q. B. 493.

*Statute of Limitations* from being a bar to another action brought within six years for the recovery of the principal debt itself.

Upon this point, therefore, the appeal fails.

The second question is whether, in order to indemnify the trustees, the Court ought to impound the income of the trust funds during the life of the Appellant. This question turns on the construction of sect. 6, and on the conduct of the parties. [His Lordship then read sect. 6, and continued:—]

Did the trustees commit the breach of trust for which they have been made liable at the instigation or request, or with the consent in writing of the Appellant? The section is intended to protect trustees, and ought to be construed so as to carry out that intention. But the section ought not, in my opinion, to be construed as if the word "investment" had been inserted instead of "breach of trust." An enactment to that effect would produce great injustice in many cases. In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. If a *cestui que trust* instigates, requests, or consents in writing to an investment not in terms authorized by the power of investment, he clearly falls within the section; and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him—at all events, not unless he could give some good reason why it should, *e g.*, that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request, or consent in writing to an investment which is authorized by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him unless they can shew that he instigated, requested, or consented in writing to their non-performance of their duty in this respect.

This is, in my opinion, the true construction of this section.

As regards the necessity for a writing, I agree with the decision of Mr. Justice *Kekewich* in *Griffith* v. *Hughes* (1), that

(1) [1892] 3 Ch. 105.

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an instigation or request need not be in writing, and that the words "in writing" apply only to the consent.

I pass now to the facts. It is, in my opinion, perfectly clear that the Appellant instigated, requested, and consented in writing to the investment by the trustees of the trust money on a mortgage of Lord *Hill's* estate. This, indeed, was not disputed. But the evidence does not, that I can see, go further than this. He certainly never instigated, requested, or consented in writing to an investment on the property without inquiry; still less, if upon inquiry the rents payable in respect of the lands mortgaged were found to be less than the interest payable on the mortgage.

Whether the Appellant knew the rental is a very important question. Mr. Justice *Kekewich* has found that he did. But the evidence does not, in my opinion, warrant this inference. The Appellant certainly knew a good deal about the property; and Colonel *Hill*, to whom he very much trusted, most likely knew more than the Appellant himself. There was also a proposal from Lord *Hill*, which the Appellant once had, but which was lost. This might have shewn the rental. But the Appellant positively denies that he knew the rental, and says that Mr. *Haste*, the mortgagor's agent, told him it was £1700 a year, whilst in fact it was only £1070 net. It was contended that Messrs. *Wilde, Berger & Co.*, who were the solicitors of the mortgagor and of the trustees, were also the solicitors of the Appellant, and that through them he must be treated as having known of the valuation and the rental, and all other material facts. But to affect him with this notice would be extremely unjust, for the facts, a knowledge of which the Court is asked to impute to him, were clearly kept from him. The solicitors obtained the valuation for and on behalf of the trustees; they obtained the second opinion of the valuers for the benefit of the borrower, and for the protection of the trustees. In obtaining the valuation and opinion the solicitors were not acting for or on behalf of the Appellant; and, considering that they never disclosed the valuation or opinion to the Appellant, and never informed him of their effect, he cannot, in my opinion, be held to have known them. It is important to observe that the statute does not make a *cestui que trust* responsible for a breach of trust simply because

he had actual or constructive notice of it; he must have instigated or requested it, or have consented to it in writing. Even if the knowledge of his solicitors could be imputed to him for some purposes, it is not true in fact that the Appellant did by himself or his agent instigate, request, or consent in writing to the breach of trust. Even if the Appellant had constructive notice through his solicitors of the valuation, the Court, in exercising the power conferred upon it by the statute, would, in my opinion, be acting unjustly, and not justly, if, under the circumstances of this case, it held the Appellant liable to indemnify the trustees. The Court would be treating the Appellant as having done more than he did, and I can see no justification for such a course. It must be borne in mind that the Plaintiff was not seeking to benefit himself at the expense of the remaindermen as in *Raby* v. *Ridehalgh* (1). He was seeking a better security for the trust money for the benefit of every one interested in it.

Under these circumstances and for these reasons I am unable to concur in Mr. Justice *Kekewich's* judgment on this point, and his judgment must be reversed accordingly. The result will be that the Appellant will receive the income yielded by the trust fund which is not lost, but will not receive any personal benefit from what the trustees have to make good. The appeal failing in part and succeeding in part, each party must bear his own costs of the appeal.

A. L. SMITH, L.J.:—

Two points arise upon this appeal—the one, whether the Defendants, who in 1878 invested upon mortgage the trust funds of Mr. *Vere Somerset's* marriage settlement upon insufficient security in such circumstances as to constitute a breach of trust, are, in an action brought against them for such breach by him and other beneficiaries some thirteen years afterwards, entitled as against Mr. *Vere Somerset* to take advantage of sect. 8 of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), and to set up the *Statute of Limitations.*

The other is, whether Mr. Justice *Kekewich* was right in

(1) 7 D. M. & G. 104.

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granting to the Defendants the indemnity provided by sect. 6, sub-sect. 1, of that Act. [His Lordship then read sect. 6 sub-sect. 1, and continued:—]

It appears to me that this is an action brought to recover money, for it is an action brought to recover from the Defendant trustees the money which has been lost to the trust funds in consequence of their breach of trust.

It was conceded at the Bar that it is the statute of 21 Jac. 1, c. 16, imposing a limitation of six years, which applies to this case.

It is said—and in this I agree—that the defence is to be treated as if it were a plea of the *Statute of Limitations* pleaded at common law to an action for money had and received. The cause of action was complete in 1878 when the Defendants committed the breach of trust, and consequently, unless the Plaintiff, Mr. *Vere Somerset*, can make out some acknowledgment so as to take the case out of the statute, it will apply. This he seeks to do by shewing that he received the interest upon the trust funds invested upon mortgage down to the year 1890.

It has long since been settled that the mere fact of part payment of a debt is not sufficient to take a case out of the *Statute of Limitations*. Sir *Frederick Pollock*, C.B., once directed a jury that it was, but that direction was held to be undoubtedly erroneous: *Wainman* v. *Kynman* (1). To take the case out of the statute there must be a part payment of the debt under such circumstances as establish a promise to pay the remainder; or, as Baron *Parke* said in *Davies* v. *Edwards* (2), "The party who makes the payment must say in effect, 'I make this payment on account of the debt.'"

The same applies to the payment of interest.

To take the case out of the statute there must be a payment of interest *quâ* interest due upon the debt, thereby acknowledging more to be due: *Sims* v. *Brutton* (3).

It is true that in this case Mr. *Vere Somerset* received periodically down to 1890 interest upon the moneys lent by the

(1) 1 Ex. 121. (2) 7 Ex. 23.
(3) 5 Ex. 802, 809.

trustees to Lord *Hill* upon mortgage. Even if this interest had been paid to him by the Defendants—which it was not, for apparently he received it direct from Lord *Hill*, though I do not think this is material—how can such payment of interest be an acknowledgment by the Defendants that they owed Mr. *Vere Somerset* more money? If the trustees had paid the interest to the Plaintiff they would not have paid it as interest on money of his in their hands, and due from them to him, but as interest received from the mortgagor: see *Sims* v. *Brutton* (1). The payment of interest in this case was not made as a payment by the Defendants on account of any debt due from them to the Plaintiff, or on account of any liability they were under to him. At the most, it is an admission that the trust funds were duly invested by them on behalf of the *cestui que trust*. It was, in fact, a payment of the interest due from Lord *Hill* under the mortgage deed to the Plaintiff, and nothing more. It is impossible to twist this payment of interest into an admission by the Defendants of a debt due from them to Mr. *Vere Somerset*, as he now attempts to do, to avoid the effect of the statute.

In my judgment, Mr. Justice *Kekewich* arrived at the right conclusion when he held that the *Statute of Limitations* was a bar to this action for breach of trust by Mr. *Vere Somerset* against the Defendants.

I now come to the second point, which is, whether the trustees committed the now unquestioned breach of trust at the instigation, or request, or with the consent in writing of the beneficiary, Mr. *Vere Somerset*, so as to entitle them to apply for the indemnity provided by sect. 6, sub-sect. 1, of the Act of 1888.

It is necessary in the first place to ascertain the true meaning of this section. Does it mean, that in order to entitle the trustees to the indemnity it must be proved that the beneficiary had instigated, requested, or consented in writing, knowing facts which rendered what he was instigating, requesting, or consenting in writing to, a breach of trust? Or, will it suffice if it be proved that the beneficiary merely instigated, requested, or consented in writing to the investment, not knowing that it was a breach of trust, but which, in fact, it turned out to be?

(1) 5 Ex. 807.

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The words of the section are, "Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary." The words are not, where a trustee shall have made an investment at the instigation, or request, or with the consent in writing of a beneficiary which turns out to be a breach of trust. Ordinarily, a person can only instigate, request, or consent to what he knows.

In my opinion, upon the true reading of this section, a trustee, in order to obtain the benefit conferred thereby, must establish that the beneficiary knew the facts which rendered what he was instigating, requesting, or consenting to in writing a breach of trust. This issue is upon the trustee when he asks for relief under the section; and the question is, Have the Defendants in this case established it?

It was proved that Mr. *Vere Somerset* was anxious from the year 1876 that his trust funds, which amounted to about £35,000, should be shifted out of the securities they then were in, and invested upon Lord *Hill's Hawkestone* estate. He was desirous that this should be done so as to have a better security for the trust funds. He knew that the acreage of this estate was 722 acres. He knew the farms, their names, and the locality in which they were situated. He consulted upon the matter his father-in-law, Colonel *Hill*, who was a trustee of the *Hawkestone* estate, and who, according to the Plaintiff's own evidence, undertook the negotiations with Lord *Hill* and Mr. *Haste* (Lord *Hill's* agent) as regards the proposed advances. Colonel *Hill* presumably was well acquainted with the farms. It was proved that Mr. *Vere Somerset* pressed the Defendants to make the advances against the *Hawkestone* property, and signed a written consent in that behalf.

The above facts, in my judgment, were established. It was not proved, as Mr. Justice *Kekewich* apparently thought, that Mr. *Vere Somerset* knew that the rental of the *Hawkestone* estate was only £1070. There is no evidence of this; but, on the contrary, his evidence was that he was told by Mr. *Haste*, Lord *Hill's* agent, that the rental was £1700 a year. Nor did Mr. *Vere Somerset* know, as Mr. Justice *Kekewich* also thought, that £42,750 was the figure arrived at by Sir *J. W. Ellis* as the value

of the estate. It does, however, appear from the report made by Sir *J. W. Ellis*, which the trustees obtained for their own information, and which they never communicated to Mr. *Vere Somerset*, that the net rental of the property was £1070, and was consequently less than the annual amount required to pay the interest at 4 per cent. upon the £35,000 advanced by about £300 a year.

It also appeared upon the report that, to arrive at the £42,750 which Sir *J. W. Ellis* estimated the property as being worth, it would be necessary that it should realize forty years' purchase upon the actual rental, which, on agricultural land such as this, was admitted to be an unheard-of thing.

It is true that Sir *J. W. Ellis* estimated that the rentals might be increased to £1425 a year, which is just over what was required to pay the interest, and upon this estimate he got his £42,750 by thirty years' purchase.

It cannot, I think, be doubted that the security was wholly insufficient for an investment of trust funds amounting to £35,000. All Mr. *Vere Somerset* was told was that Sir *J. W. Ellis* had reported that the estate was sufficient security for £30,000, and he was subsequently told that the trustees had arranged to advance a further £5000, for which Mr. *Vere Somerset* gave his written consent. In these circumstances, have the trustees established the issue which is upon them? My answer is, No.

It is true that Mr. *Vere Somerset* desired for his trust funds the security of the *Hawkestone* estate, which he knew consisted of 722 acres, and that he pressed for it; but it has not been proved that he knew that the rental was only £1070, nor how Sir *J. W. Ellis* came to the conclusion that it was a sufficient security for £35,000. This information, which the trustees had, they kept to themselves, and never communicated to Mr. *Vere Somerset*.

In my judgment, the true view of the evidence is that, although much desiring and pressing for the investment, Mr. *Vere Somerset* left it to the trustees to determine if it were a proper one for the moneys proposed to be advanced, and was thinking that he was getting a good and secure investment for his trust moneys. So much for the knowledge and conduct of Mr. *Vere Somerset* himself.

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Then a further point was made on behalf of the trustees, which was, that, as Messrs. *Wilde, Berger & Co.* knew all the facts, as they acted as solicitors for Mr. *Vere Somerset* in the transaction, notice to them of Sir *J. W. Ellis'* report was notice to Mr. *Vere Somerset* of the facts therein contained, and consequently their knowledge of these facts was his knowledge.

The circumstances are these: Messrs. *Wilde, Berger & Co.* were solicitors of Lord *Hill*, the proposed mortgagor. Mr. *Jenkyns* had been the solicitor of the trustees, but in order to save expense Messrs. *Wilde, Berger & Co.* were permitted to act both for Lord *Hill* and the trustees. Before the 9th of March Mr. *Vere Somerset* changed his solicitor, Mr. *Jenkyns*, and appointed Messrs. *Wilde, Berger & Co.* to act for him. The retainer of Messrs. *Wilde, Berger & Co.* by Mr. *Vere Somerset* was given to them, so that they might be able more readily to carry out what Mr. *Vere Somerset* and his wife had to do to complete the transaction than if two solicitors were engaged. Messrs. *Wilde, Berger & Co.* were not engaged by Mr. *Vere Somerset* to negotiate the transaction of the loan on his behalf, or to advise him as to whether it ought or ought not to be carried out, so that the notice given to them might be said to be notice given to the agent of Mr. *Vere Somerset* in the transaction, and therefore notice to him. The information which Messrs. *Wilde, Berger & Co.* obtained about the rent and value of the estate was obtained by them solely on behalf of the trustees, and it may be in the interests of the borrower, Lord *Hill*, but certainly not on behalf or in the interest of Mr. *Vere Somerset*, and thus the information so obtained was never communicated to him.

In these circumstances, in my judgment, it would be wrong to hold that the knowledge Messrs. *Wilde, Berger & Co.* thus obtained was the knowledge of Mr. *Vere Somerset*, so as to cause the Court to find that, within the meaning of sect. 6 of the Act of 1888, Mr. *Vere Somerset* instigated, requested, or consented in writing to a breach of trust of which, as a matter of fact, he was ignorant.

For these reasons, in my judgment, this point fails the Defendants, as also a similar one which was taken—namely, that the knowledge of Lord *Hill's* agent, Mr. *Haste*, was the knowledge of

Mr. *Vere Somerset.* In my judgment, the trustees are not entitled to the relief which Mr. Justice *Kekewich* gave them, for they have failed to establish the issue which was upon them; so that the learned Judge's judgment should be reversed, and the appeal allowed upon the second point. I agree that there should be no costs, as each party has in part succeeded.

DAVEY, L.J., stated the facts of the case, and remarked that it was material to observe that Mr. *Vere Somerset* would not gain any benefit to himself from the change of investment by way of increased income, and that his object seemed to have been the very proper one of obtaining a good permanent investment of the capital. His Lordship then continued:—

In the result, the sum of £34,000 was advanced by the trustees. The interest was paid down to August, 1890, since which time there has been default; and on the 23rd of February, 1892, Mr. *Vere Somerset* and his children (Mrs. *Somerset* having died) commenced this action against the trustees. The learned Judge has held that the investment was a breach of trust of which the children have a right to complain, and there is no appeal against that part of his judgment, and indeed it is difficult to see how he could have held otherwise, the only singularity of the case being that the trustees were advised by solicitors of the highest position and by land valuers also of experience in their profession. But he has also held that Mr. *Vere Somerset's* action is barred by the *Statute of Limitations,* and that his life interest in the trust funds ought to be impounded to indemnify the trustees.

The learned Judge finds that Mr. *Vere Somerset* knew that the net income of the property was £1070 only. I confess that I can find no evidence to justify this finding. Mr. *Haste* was dead at the time of the trial, and Mr. *Berger* was not called; and Mr. *Somerset,* though pressed on cross-examination, said that he did not know the income of the property, and that Mr. *Haste* had told him it was £1700. It appears that at an early stage of the business Mr. *Haste* prepared a proposal which was sent to Mr. *Vere Somerset,* and considered by him. But it was not produced, and there was no clear evidence of its contents. We cannot, I think, properly on this evidence draw the inference

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that it contained a statement of the present income of the property.

The first question, therefore, which we have to decide is whether Mr. *Vere Somerset's* action is barred. I do not propose to add very much to what has been said by the other members of the Court. I do not think it makes any difference whether the trustees received the interest and paid it to Mr. *Somerset*, or whether they allowed him to receive it direct from Lord *Hill*; but I am of opinion it was not interest on the sum sought to be recovered in this action, and it appears to me that it would be almost an outrage on common sense to treat the payment to Mr. *Somerset* of the interest on the mortgage as an acknowledgment by the trustees of the existence of the debt sought to be recovered in this action. If it was evidence of anything, it was evidence of Mr. *Somerset's* acquiescence and acceptance of the mortgages as a proper investment. I am, therefore, of opinion that on this point the learned Judge was right.

The other point appears to me to be one of greater difficulty. The answer to it depends on the construction of sect. 6 of the *Trustee Act*, 1888, and the application to be given to that section.

Undoubtedly the investment was made at the instigation or request, or with the consent in writing, of Mr. *Vere Somerset*. But I am of opinion that is not enough, and that in order to bring the case within the section the beneficiary must have requested the trustee to depart from and go outside the terms of his trust. It is not, of course, necessary that the beneficiary should know the investment to be in law a breach of trust; but he must, I think, know the facts which constitute the breach of trust. But, supposing I am wrong in this, and that it should be held to be sufficient, in order to bring the section into operation, that the beneficiary requested or consented to the investment in question, it appears to me that we arrive at the same result from a consideration of the latter words of the section, which does not impose on the Court the duty in all events of impounding the interest of the beneficiary, but invests the Court with a discretionary power (to be exercised judicially) "if it shall think fit," to "make such order as to the Court shall seem just" for the purpose.

It appears to me that, in coming to the conclusion of what is just, the Court must have regard to settled legal principles. Although the power of impounding the interest of the beneficiary is extended by the section to new cases, it is not a new power, and I cannot find any words in the section which have the effect of directing the Court to exercise the statutory jurisdiction on principles different from those on which it acted before the statute. The leading case on the subject is *Raby* v. *Ridehalgh* (1). Lord Justice *Turner's* judgment in that case did not go beyond holding that the tenant for life, having been privy and party to the breach of trust, was liable to recoup the trustees; and see *Sawyer* v. *Sawyer* (2). Was Mr. *Vere Somerset* either party or privy to this breach of trust? The case is undoubtedly very near the line, remembering that the trustees are in the position of debtors seeking an indemnity from another against their own liability. If I agreed with the learned Judge's views as to the facts of the case, I should agree with his decision; but I have come to the conclusion that there is not sufficient evidence that Mr. *Vere Somerset* knew of the insufficiency of the security, or that he ever desired, requested, or consented, or was privy to his trustees stepping outside the terms of their trust. Why should he? He was to gain nothing himself, and his object was to have the funds securely invested. Messrs. *Wilde's* letter of the 17th of July, 1878, to Mr. *Granville Somerset*, seems to me accurately to express Mr. *Vere Somerset's* attitude of mind as gathered from the correspondence and evidence. The letter to Mr. *Vere Somerset* himself of the 10th of July, 1878, was not calculated to inform him that a breach of trust was contemplated, or to excite his suspicion. It is true that this loan was afterwards increased to £35,000, and he was informed of this by their letter of the 20th of July, and on this point I have felt great difficulty; but I think he was entitled to assume from the tenure of their letter, that the trustees, in having so arranged, had done so on sufficient advice and with sufficient care.

We were pressed to treat Mr. *Berger's* knowledge as Mr. *Vere Somerset's*, on the ground that it is admitted in the answers to interrogatories that, to some extent, the firm acted as his solicitors.

(1) 7 D. M. & G. 104. (2) 28 Ch. D. 595, 598.

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But I do not think that there are any sufficient grounds on which we can affect Mr. *Vere Somerset* with Messrs. *Wilde's* knowledge, or, if he had no direct knowledge, hold, that he had constructive notice—even assuming that constructive notice would be sufficient to affect him with liability.

On the whole, therefore, I am of opinion that, on this point, we must reverse the judgment of Mr. Justice *Kekewich.*

The result will be that Mr. *Vere Somerset* will be entitled to receive the income of the funds realized from the security, but the trustees will retain for their own use the interest of the money paid by them to make good the deficiency of the mortgage.

Solicitors: *Pritchard, Englefield & Co.,* for *E. Bygott, Wem, Salop; Hulberts & Hussey.*

W. W. K.

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*Dec.* 8, 9, 19.

## MARTIN *v.* PRICE.

[1893 M. 2974.]

*Light—Injunction or Damages—Future Injury—Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2—*Special Circumstances—Jurisdiction.*

In an action for an injunction to restrain the Defendant from further building so as to interfere with the Plaintiff's ancient lights, and for a mandatory injunction to compel him to pull down like buildings already constructed, the Plaintiff proved that if the Defendant's building was completed it would seriously interfere with his light; but he failed to prove that the commercial value of his premises, or the facility of letting them, would be materially affected. The premises of the Plaintiff and the Defendant were both leaseholds held under the same lessor, who had consented to the erection of the Defendant's building:—

*Held,* by *Kekewich,* J., that under the special circumstances the Court was justified in giving damages both for the completed and the threatened interference, instead of an injunction:

But *held* by the Court of Appeal, that the Plaintiff, having proved his legal right to the light, and that the proposed building would infringe that right, and there being no special circumstances disentitling him to relief, he was entitled to an injunction as to the threatened building and to damages only as to the completed buildings.

Whether the Court has jurisdiction to give damages in respect of threatened injury, instead of an injunction, *quære.*

*Holland* v. *Worley* (1) and *Aynsley* v. *Glover* (2) considered.

THE Plaintiff in this action was the lessee of a house in *Temple Street, Birmingham,* under a lease of which about twenty-nine

(1) 26 Ch. D. 578. (2) Law Rep. 18 Eq. 544.

years were unexpired. He did not occupy the house himself, but had sublet it to various persons. Part was an hotel, held on a sublease which would expire in 1901. Part was let to an auctioneer and estate agent, on a lease which would expire in December, 1894. Other parts were let to other people from year to year. Some of the windows in the Plaintiff's house were ancient lights. *Temple Street* is a street which runs north and south, and is from 35 to 37 ft. wide. Opposite to the Plaintiff's house, which had a considerable frontage, was a large house having a frontage of 77 ft., and an elevation of 37 ft. or thereabouts, above the level of the street. This house was the property of the Plaintiff's lessor, and was let to the Defendant on a lease of ninety-nine years. The Defendant had pulled down the house, and proposed to erect in its place a large building about 25 ft. higher than before, and when the writ was issued part of the front wall of the new building, having a frontage of 27 ft., had been erected to a height of 24½ ft. higher than the old building; but no other part of the new building had been carried up higher than 37 ft. The Plaintiff's house stood on rising ground and within a few yards of a large open space, which rendered the loss of light less important.

On the 10th of October, 1893, the Plaintiff commenced the present action for an injunction to restrain the Defendant from building higher than the old house, and to compel him to pull down so much as was already built above that height; the writ also claimed damages.

A motion for an injunction was made by the Plaintiff, and on the 27th of October, 1893, when it came on to be heard, it was treated by consent as the trial of the action, and came on again for hearing on the 7th of November, 1893.

Evidence was taken orally in Court, the result of which is stated in the judgment of Mr. Justice *Kekewich*.

*Warmington*, Q.C., *Renshaw*, Q.C., and *Micklem*, for the Plaintiff:—

It having been proved that the buildings of the Defendant, actual and intended, constitute and will constitute a substantial interference with the Plaintiff's ancient lights, the Plaintiff is

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entitled to an injunction, mandatory as to the existing buildings and prohibitory as to the intended buildings.

*Marten*, Q.C., *Jelf*, Q.C., and *Ingpen*, for the Defendant:—

We submit that the case is one in which, having regard to the inconsiderable extent of the injury, no injunction ought to be granted, but the proper remedy, if any, is by way of damages. It is clear that a mandatory injunction ought not to be granted: see *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (1), where the buildings of the defendant having been completed before bill filed, a mandatory injunction was refused, and an inquiry as to damages directed, though not prayed by the bill; and see also *City of London Brewery Company* v. *Tennant* (2) shewing that damages may be granted though the injury is not such as would have justified the granting of a mandatory injunction. In *Holland* v. *Worley* (3), *Pearson*, J., summarizing the views expressed by *Jessel*, M.R., in *Aynsley* v. *Glover* (4), *Krehl* v. *Burrell* (5), and *Smith* v. *Smith* (6), lays it down that the only case in which an injunction must necessarily be granted is where the building of the defendant will render the property of the plaintiff useless; so that, if damages in lieu of an injunction were granted, the plaintiff would in effect be compelled to sell his property to the defendant. In all other cases the Court has a large discretion, which is, of course, to be exercised with due regard to all the circumstances. This view of the law was adopted by *Bacon*, V.C., in *Greenwood* v. *Hornsey* (7). In the present case, when it is considered that there is no complaint on the part of the freeholder, that there is no evidence of direct complaints by the Plaintiff's tenants, or that the selling or letting value of the property will be diminished, that the interference with the Plaintiff's light is small in itself and rendered of less importance to him by reason of the position of his premises, the Court will surely be justified in the exercise of its discretion in refusing an injunction, and awarding damages only.

(1) Law Rep. 19 Eq. 616.
(2) Ibid. 9 Ch. 212.
(3) 26 Ch. D. 578.
(4) Law Rep. 18 Eq. 544.
(5) 7 Ch. D. 551.
(6) Law Rep. 20 Eq. 500.
(7) 33 Ch. D. 471.

*Warmington*, in reply:—

This is not an action for damages for a tort, but it is grounded on the interference by the Defendant with the Plaintiff's statutory right acquired under the *Prescription Act*. A substantial interference with the Plaintiff's ancient lights having been proved, he is entitled to an injunction as a matter of right: *Yates* v. *Jack* (1); *Scott* v. *Pape* (2). *Holland* v. *Worley* (3), which is the only case in which an injunction has been refused where there was substantial interference with ancient lights, has often been cited and commented on, but never approved, and it establishes no intelligible principle for the guidance of the Court in other cases.

1893. Nov. 18. KEKEWICH, J. (after considering the evidence in the case, expressed his opinion that it was established beyond a doubt, that as regarded all the windows which were ancient there was or would be a serious interference with the access of light in consequence of the Defendant's building. His Lordship then proceeded as follows):—

That the Defendant's buildings have interfered or will interfere largely with the access of light over the servient to the dominant tenement being thus established, there is no occasion gravely to discuss the Defendant's contention that he is entitled to judgment. But there remains the difficult and important question, what is the proper measure of relief to be accorded to the Plaintiff, or, in other words, whether he should be awarded an injunction or damages. Unfortunately the reported cases do not lay down any definite rule, or state any principle guiding the different solutions of this question under different circumstances. That it is a matter of judicial discretion all are agreed, and that must be the same whether the jurisdiction is conferred by Lord *Cairns' Act* or otherwise—an immaterial question—but on what lines that discretion is to be framed and exercised is by no means clear. The two authorities always referred to are *Aynsley* v. *Glover*, before the late Master of the Rolls in 1874 (4), and *Holland* v. *Worley*, before Mr. Justice *Pearson* in 1884. There

(1) Law Rep. 1 Ch. 295.
(2) 31 Ch. D. 554.
(3) 26 Ch. D. 578.
(4) Law Rep. 18 Eq. 544.

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are others; but I venture to say that if no rule can be extracted from those cases it cannot be found elsewhere. Let me turn first to *Holland* v. *Worley* (1). Mr. Justice *Pearson's* opinion, which is stated to be the summary of those expressed by the Master of the Rolls in *Aynsley* v. *Glover* (2), *Krehl* v. *Burrell* (3), and *Smith* v. *Smith* (4), is on page 587 of the report, and he apparently states the dividing line between the cases in which an injunction must, and the cases in which an injunction need not be granted. It must be granted where the defendant's building will render the plaintiff's property useless, because if the other remedy—damages—were given instead, those damages would necessarily be equivalent to the entire value of the property, and the plaintiff would really be selling under compulsion. There are passages in some of the judgments of the Master of the Rolls which express much the same idea, and I respectfully add my opinion that it is uncontrovertibly true. On the other side of the line Mr. Justice *Pearson* places all the cases where the injury to the plaintiff would be less serious, that is, where the Court considers that his property may still remain, and be as substantially useful to him as it was before, and the injury can be compensated by money. In all these cases, according to the statement under consideration, the Court may, if it thinks fit, award money compensation instead of an injunction. It may be that to this ruling, read as part of a judgment on the particular facts then before the Court, no exception could be taken, and of that opinion apparently was Vice-Chancellor *Bacon* when he referred to it in *Greenwood* v. *Hornsey* (5); but, speaking with deep respect to the learned Judge, I yet desire to say that for any other purpose it is not satisfactory. There are numerous cases constantly occurring in which the injury to the plaintiff is far less than supposed in the first class, and in which, as I understand the doctrine and practice of the Court, an injunction goes as a matter of course. I agree that the discretion of the Court is large, and that it must be exercised, as Vice-Chancellor *Bacon* says, with an intimate knowledge of the facts of each particular

(1) 26 Ch. D. 578.
(2) Law Rep. 18 Eq. 544.
(3) 7 Ch. D. 551.
(4) Law Rep. 20 Eq. 500.
(5) 33 Ch. D. 476.

case, and further that what is apparently at first sight a case for injunction may, on further investigation, be reduced to one for damages, and that a claim which seems to sound in damages only may demand an injunction. But where the injury is substantial, and neither is there any imperfection in the plaintiff's title, such for instance as might be created by *laches* on his part, nor are there any other circumstances to modify the severity of the Court supporting a statutory right, injunction is, I think, the proper remedy. That was, I think, the view of the late Master of the Rolls, and I doubt whether Mr. Justice *Pearson* intended to hold otherwise, although, with reference to the particular facts of *Holland* v. *Worley* (1), he divided the cases into two classes only. I am not aware of any case in which the Court has admitted the claim of defendants to consideration on the ground that they have by other means compensated the plaintiff for light abstracted. I have frequently rejected such a claim myself, and I doubt whether it has ever been favourably entertained by any Judge. With this exception, however, all circumstances must be placed in the balance, and duly weighed in the determination of the question whether the injunction must go or damages will be sufficient. In *Aynsley* v. *Glover* (2), Sir *George Jessel* says: "I had one [case] before me in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted on the defendant, I thought, under the special circumstances, damages should be given instead of an injunction." According to a note of mine in the margin of the report he was referring to a case of *Ball* v. *Earl of Derby* (3), in which I was counsel for the defendants, and in which judgment was given on the 5th of March, 1874. The plaintiff was owner of a small public-house situate, if I remember rightly, on the *Surrey* side of the *Thames*, and the defendants were the *Peabody* trustees, who had erected a large building for the accommodation of the working classes of the metropolis. The injury to at least one window of the plaintiff's house was clearly proved, and indeed was not disputed; but the Court did not think fit to grant an injunction.

(1) 26 Ch. D. 578. (2) Law Rep. 18 Eq. 555.
(3) Unreported.

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I do not remember that there was any reasoned judgment; but I have had looked up the order and the Registrar's note, and I have no doubt that this is the case to which the Master of the Rolls referred. He awarded £200 damages; and in doing so, intended, I believe, to fully compensate the plaintiff, and yet not to destroy a building of a charitable and almost public character. I know of no better illustration of the length to which the Court would go in considering all the circumstances of any particular case.

According to my view above expressed, the interference of the access of light by the Defendant's buildings is and will be substantial. I should not place much reliance on the Defendant's evidence standing alone—that it will not interfere with the selling or letting value of the Plaintiff's property; but the proved facts tend in the same direction, and the Plaintiff has not dared to adduce evidence to the contrary. His property is for the present well let, and there is nothing to indicate that any part of it will be on his hands during the remainder of the term. That term is so short that, treating him as a man of ordinary prudence, he is not likely to make any considerable alteration in his buildings, or to endeavour to convert them to any new purpose; and although the bedrooms could never have been cheerful, and they and the other rooms will certainly be deprived of a considerable quantity of direct light, and especially in the early part of the day, yet by reason of the peculiar position on a rising ground, and within a few yards of a large open space, there will remain so much light available that the obstruction by the Defendant's buildings must fall far short of destruction of utility. What I should have done if the freeholder had been complaining—to what extent I should have been influenced by direct complaints on the part of the tenants, I need not and cannot say; but the claim of the actual Plaintiff seems to me, on full consideration of all the circumstances of the case, to fall within that class in which the Court may and should award damages instead of an injunction. What those damages should be is another and perhaps equally difficult question, which could not be adequately threshed out without reference to some competent person, say the Official Referee, who could conduct the

inquiry on the spot. I think that I ought to have the courage to cut the knot, and to avoid these extra costs and trouble which, after all, might not yield a satisfactory result. It is not the practice of the Court, and it is not my duty to state, by what means—imperfect or otherwise—my conclusion as regards amount is reached. The parties will probably give me credit for having done my best, and, at any rate, I can do no more. The judgment will be for £120 damages (for actual and possible interference) and costs of action.

C. C. M. D.



From this judgment the Plaintiff appealed. The appeal came on to be heard on the 7th of December, 1893.

*Warmington*, Q.C., and *Renshaw*, Q.C. (*Micklem*, with them), for the Appellant, cited *Aynsley* v. *Glover* (1); *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (2); *Krehl* v. *Burrell* (3); *Hackett* v. *Baiss* (4); *City of London Brewery Company* v. *Tennant* (5); *Moore* v. *Hall* (6); *Greenwood* v. *Hornsey* (7); *National Telephone Company* v. *Baker* (8); *Lawrence* v. *Horton* (9); *Dicker* v. *Popham, Radford & Co.* (10); *Dreyfus* v. *Peruvian Guano Company* (11); *Sayers* v. *Collyer* (12); *Goodson* v. *Richardson* (13).

*Jelf*, Q.C., and *Ingpen*, for the Defendant, referred to *Holland* v. *Worley* (14); *Smith* v. *Smith* (15); *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (16); *Golding* v. *Wharton Saltworks Company* (17).

*Renshaw*, in reply.

(1) Law Rep. 18 Eq. 544; 10 Ch. 283.
(2) 6 Ch. D. 757.
(3) 7 Ch. D. 551; 11 Ch. D. 146.
(4) Law Rep. 20 Eq. 494.
(5) Ibid. 9 Ch. 212.
(6) 3 Q. B. D. 178.
(7) 33 Ch. D. 471.
(8) [1893] 2 Ch. 186, 196.
(9) 59 L. J. (Ch.) 440.
(10) 63 L. T. (N.S.) 379.
(11) 43 Ch. D. 316.
(12) 28 Ch. D. 103.
(13) Law Rep. 9 Ch. 221.
(14) 26 Ch. D. 578.
(15) Law Rep. 20 Eq. 500.
(16) Ibid. 19 Eq. 616.
(17) 1 Q. B. D. 374.

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1893. Dec. 19. LINDLEY, L.J., delivered the judgment of the Court (*Lindley, A. L. Smith*, and *Davey*, L.JJ.).

After stating shortly the facts of the case as set forth above, and the order of Mr. Justice *Kekewich*, his Lordship proceeded as follows:—

The Plaintiff has appealed from this judgment on the ground that he is entitled to an injunction, and that the learned Judge had no jurisdiction to award damages in lieu of an injunction in respect of that part of the house which was not yet higher than the old building which the Defendant had pulled down. The Plaintiff also complains that the learned Judge had no sufficient materials for estimating the amount of damages, no evidence having been adduced by him on that point, he wanting an injunction and not damages.

The Defendant has given no cross-notice of appeal, but he has contended that the learned Judge had jurisdiction to do what he did; that whether an injunction should be granted, or damages be awarded, was a matter for the discretion of the Judge; and that, even if an appeal from the exercise of such discretion will lie, there are no grounds which will justify the Court of Appeal in interfering with its exercise in this particular case. The Defendant, moreover, contended that the interference with the Plaintiff's lights was and would be so small, that the damages awarded were extremely liberal if not extravagant.

The question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this Court, in *Dreyfus* v. *Peruvian Guano Company* (1), expressed a clear opinion against the existence of such jurisdiction (2). On the other hand, it has been very commonly assumed, and there are several observations by eminent Judges favouring the view, that there is such a jurisdiction; and in *Holland* v. *Worley* (3) the late Mr. Justice *Pearson* did award damages in lieu of an injunc-

(1) 43 Ch. D. 316.
(2) See *per Bowen*, L.J., at p. 333; and *per Fry*, L.J., and *Cotton*, L.J., at p. 342.
(3) 26 Ch. D. 578.

tion which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it. If there is no such jurisdiction, the order appealed from will be wrong. But, assuming the jurisdiction to exist, we are of opinion that, upon the facts of this case, the Plaintiff was entitled to an injunction to restrain the Defendant from continuing to build higher than the old house, to the detriment of the Plaintiff. The learned Judge found as facts that some of the Plaintiff's lights were ancient, and that they were already obstructed to a substantial extent, and would be still further obstructed. He found that the Plaintiff had sustained, and would sustain, material injury, entitling him to substantial damages. We see no reason to differ from him on these matters of fact. The Plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent, being thus established, the Plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the Plaintiff of this *primâ facie* right; but we can discover none in this case. The order appealed from, therefore, must be discharged so far as it awards damages only to the Plaintiff, and in lieu thereof the order will be to grant an injunction in the ordinary form to restrain the Defendant from continuing to build higher than the old building above the level of the street, to the injury of the Plaintiff, and to grant an inquiry by the Official Referee as to the damages sustained by the Plaintiff by reason of the building already erected beyond that height, and to order the Defendant to pay such damages, but to reserve the costs of the inquiry, in order that they may be dealt with by the Judge. The Plaintiff having succeeded in his appeal, the Defendant must pay the costs of the appeal.

Solicitors: *Sharpe, Parker, Pritchards, & Barham,* agents for *Ryland, Martineau & Co., Birmingham; Burton, Yeates, & Hart,* agents for *Edge & Ellison, Birmingham.*

M. W.

C. A
1893
Dec. 6.

## *In re* BUCKLE.
## WILLIAMS *v.* MARSON.

[1893 B. 1631.]

*Will—Construction—Deduction—Income Tax.*

A testator, after giving various legacies, directed his trustees, out of the income of his residuary estate, to pay certain annuities, "all the said annuities to be paid clear of all deductions whatsoever except income tax."

By a codicil made five years afterwards, after varying many of the legacies and increasing the amount of one of the annuities, he proceeded: "And I expressly direct that every legacy and other interest as well derivable under my will as any codicil thereto shall be free of legacy duty and every other deduction":—

*Held*, by *North*, J., that the annuities were not given free from income tax; the case being distinguished from *Turner* v. *Mullineux* (1) by the fact that the expression in which income tax was treated as a deduction did not occur in the same instrument as that by which the annuities were directed to be free from all deductions:

*Held*, on appeal, that the testator must be taken to have had his will in his mind when he made his codicil, and to have used the word "deductions" in the same sense throughout; and that as by his will he had shewn that he understood the word to include income tax, the annuities must be paid free of income tax.

*HENRY BUCKLE*, by will dated the 16th of February, 1877, after various pecuniary and specific bequests, including legacies to servants, gave his residuary estate to trustees upon trust to convert and invest, and out of the income of the investments to pay certain annuities, including an annuity of £100 each to certain of the children of *William Boyd Buckle*, "all the said annuities (except where otherwise directed) to be paid clear of all deductions whatsoever except income tax."

The testator made two codicils to his will, by the second of which, dated the 8th of February, 1882, he gave a different set of legacies to his servants in lieu of those given by his will, increased a legacy given to a niece from £1000 to £5000, and increased an annuity of £26 to £39. He then proceeded: "And I expressly direct that every legacy and other interest as well derivable under my will as any codicil thereto shall be free of

(1) 1 J. & H. 334.

legacy duty and every other deduction, and as to those belonging to females shall be for their sole and separate use. In all other respects I confirm my said will and first codicil."

The testator died in 1886. The Plaintiff was a daughter of *William Boyd Buckle*, entitled to an annuity of £100 under the will, and took out an originating summons to have it determined whether she was entitled to have the annuity paid clear of income tax. Mr. Justice *North*, in Chambers, held that she was not, considering that the case was distinguished from *Turner* v. *Mullineux* (1) by the fact that in that case the clause by which the meaning of the word "deductions" was extended occurred in the same instrument—here in a different one.

The Plaintiff appealed.

*George Lawrence*, for the appeal:—

I admit that the gift of an annuity "free of legacy duty and every other deduction" would not make it free of income tax—income tax not being considered a "deduction": *Gleadow* v. *Leetham* (2), where Mr. Justice *Kay* (3) sums up the authorities on the subject. But here the testator has explained himself, the words "except income tax" in the will shewing that he included income tax among deductions. The distinction taken by Mr. Justice *North* is not well founded. The codicil shews that the testator had the will before him when he made it, and the two must be read together. The case, therefore, is governed by *Turner* v. *Mullineux*.

*Coltman*, for the trustees, who had been directed to argue the case for the residuary legatees:—

The will was a lengthy document, dated five years before this codicil, and it is not to be supposed that the testator remembered every particular expression he had used in it. It would be a paradoxical result that the annuities should be made free of income tax by the combined effect of two instruments neither of which alone would do it.

(1) 1 J. & H. 334. (2) 22 Ch. D. 269.
(3) 22 Ch. D. 271.

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LINDLEY, L.J.:—

I think Mr. *Lawrence's* argument well founded. Income tax is not a deduction; but if a testator tells you that he understands the word "deductions" to include income tax, it must be taken to include it. The expression in the will, "clear of all deductions whatsoever except income tax," shews that the testator treated income tax as a deduction. We must interpret the word "deductions" by the testator's use of it in his will. The case is governed by *Turner* v. *Mullineux* (1). It is urged that in that case the word was explained by an expression in the same instrument, and that here there are two instruments. I do not attach any importance to that. The testator had the will in his mind when he made the codicil, and must be taken to have used the word in the same sense throughout.

A. L. SMITH, L.J.:—

In my opinion, we have here a context which shews that the testator when he made his will treated income tax as coming under the head of deductions. By his second codicil he alters his will, and directs that his testamentary gifts shall be free from every deduction. He had shewn by his will that he considered income tax a deduction, and why are we to hold that he did not consider it to be so when he made his codicil? *Turner* v. *Mullineux* applies. I think that the distinction drawn upon the ground that the expressions are contained in different instruments should not be upheld. The will and codicil must be construed together as one instrument, conveying the meaning of one man.

DAVEY, L.J.:—

I am of the same opinion.

Solicitors: *Hollams, Sons, Coward, & Hawksley; Marson & Son.*

(1) 1 J. & H. 334.

H. C. J.

## *In re* BOROUGH COMMERCIAL AND BUILDING SOCIETY.

C. A.
1893
Dec. 6.

*Agency—Agency Fees—Firms having a Common Partner—Rules of Supreme Court*, 1883, *Order* LXV.; *App. N*, "*Close Copies.*"

It is a settled rule in the Taxing Master's Office that where a *London* firm of solicitors and a country firm have a common partner, the *London* firm cannot be treated as agent for the country firm so as to be entitled to agency fees, but will be considered as transacting the business on its own account.

Where, therefore, in winding-up proceedings, a *London* firm acted for a country firm, each firm consisting of three partners, two of whom were the same in both firms:—

*Held* (affirming the decision of *Vaughan Williams*, J.), that close copies and term fees could not be allowed on taxation.

As regards close copies, *held*, that the rule in App. N as to close copies did not give the Taxing Master a discretion as to allowing them, for that the rule only applied in cases of agency.

IN the winding up of this company, which was proceeding in *London*, an application by the liquidator against *Samuel Woods* was dismissed with costs.

*Woods* resided at *Bradford*, and his solicitors were *Ramsden, Sykes, & Ramsden*, of *Huddersfield*. The two *Ramsdens* also carried on business in *London* in partnership with *Radcliffe*, who managed the *London* business. *Sykes* had no interest in the *London* business, and did not take out a *London* certificate. Both the *Ramsdens* did. *Radcliffe* had no interest in the *Huddersfield* business. In the above matter *Ramsden, Radcliffe & Co.* acted as agents for *Ramsden, Sykes, & Ramsden.*

The registrar, in taxing the bill of costs of *Woods*, disallowed various items, consisting mainly of charges for close copies and agency term fees. *Woods* took in objections to the disallowance, on the ground that the relationship between the firms did not destroy the relationship of country solicitor and *London* agent, and that the usual agency charges ought to be allowed.

The registrar by his answers declined to admit that the *London* firm were to be treated as merely agents for the *Huddersfield*

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firm. He referred to Order LXV., App. N, of the General Orders, as giving a discretion with respect to close copies, and proceeded:—

"In this case I do not think it was necessary that the solicitors should make 'close copies' for themselves, and on that ground alone I should disallow the items, but I have inquired as to the practice of the Chancery Taxing Office on the subject, and I find that there is a long settled rule in such cases to treat the solicitors as 'properly concerned,' and not to recognise the relationship of agency where the *London* and country firms are connected in this way."

The matter was brought on appeal before Mr. Justice *Vaughan Williams* who, it was stated, expressed his view that it would be reasonable to allow the items, but considered that the settled practice of the Chancery Taxing Office must prevail, and dismissed the appeal.

*Woods* appealed.

*R. W. Harper*, for the appeal:—

This is a case of agency. A partnership for many purposes is a distinct entity, and it can sue or be sued as such, and one firm can sue another though they have partners in common: Order XLVIII*a*. (19 June, 1891). Here there are two distinct firms. The business was transacted actually by *Radcliffe*, and, as *Sykes* has no *London* certificate, the firm of *Ramsden, Sykes, & Ramsden* could not do business in *London*. They were, therefore, obliged to employ an agent, and there is no intelligible reason why they might not employ *Ramsden, Radcliffe & Co.* as their agents, the fact of the two firms having partners in common: making no practical difference whatever. But supposing that agency is not established, the close copies which form the bulk of the disallowed items ought to be allowed under the discretion given by Appendix N to Order LXV., which provides that the allowance of close copies is to depend on the propriety of making or sending the copies. Here the copies were necessary, as otherwise the originals would be constantly travelling to and fro between *London* and *Bradford*. About two years ago in a

similar case Mr. Justice *Charles* overruled objections of the same nature as those here taken by the registrar, and held that agency charges ought to be allowed.

No counsel appeared to oppose.

The Court before disposing of the case had an interview with Mr. *Ryland*, the Taxing Master, who, as stated by Lord Justice *Lindley*, informed the Court that ever since he had known the Chancery Taxing Master's Office it had been the settled rule that where a *London* firm did business for a country firm, and the two firms had a common partner, the *London* firm were not to be treated as agents, but as "properly concerned."

LINDLEY, L.J.:—

I do not think that we can run counter to the long-established practice in the Taxing Master's Office. For the last forty or fifty years it has not been the practice to treat a case as one of agency if a *London* firm has a partner who is also a partner in a country firm. This is quite consistent with the old views as to partnership which prevailed until a very recent date. One firm could not sue another at law if they had a common partner; it was necessary to come into equity and so to arrange the parties that the rights might be worked out. This has now been altered, but we are still very far from regarding a firm in the same light as a corporation. These charges, therefore, cannot be allowed on the ground that they are usual and proper agency charges. We are then referred to the rule as to close copies in Appendix N to the General Orders; but, in my opinion, that rule only refers to agency cases, not to cases where, apart from the rule, close copies could not have been allowed. It is said that Mr. Justice *Charles* some time ago made an order opposed to the view we are taking. We do not know the circumstances, nor whether he had the same information as we have as to the practice in the office, which we find to be so well settled that if it is to be altered it must be by general order and not by judicial decision.

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*In re* BOROUGH COMMERCIAL AND BUILDING SOCIETY.

A. L. SMITH, L.J.:—

The charges for close copies and term fee are purely agency charges, so the question arises whether one firm can be agent for another when the two firms have a common partner. It has been settled by a long course of practice in the Taxing Master's Office that it cannot. It is said that the rule as to close copies in Appendix N shews that a discretion is to be exercised in each case. But, in my opinion, that rule only gives a discretion where agency exists so that the question of the propriety of making close copies can arise. Mr. Justice *Charles* appears in Chambers to have given a contrary decision. The Taxing Master there had held what we are now holding, and Mr. Justice *Charles* overruled him. He had not before him, as I understand, evidence of the practice which existed, for otherwise he would not have run counter to the long-established practice of the Taxing Master's Office. If the rule is to be altered, it must be by the Rule Committee and not by us.

DAVEY, L.J.:—

I do not like our being bound to decide according to a rule of which we do not approve, but we cannot overrule the settled practice of the Taxing Master's Office, and for the reasons given by the Lords Justices we must refuse the application.

Solicitors: *Ramsden, Radcliffe & Co.*; *Iliffe & Co.*

H. C. J.

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1893
Dec. 12.

## HOLE *v.* CHARD UNION.

[1888 H. 2819.]

*Practice—Damages—Assessment down to Time of Assessment—Continuing Cause of Action—Rules of Supreme Court,* 1883, *Order* XXXVI., *r.* 58.

"A continuing cause of action," within the meaning of Order XXXVI., rule 58, is a cause of action arising from the repetition of acts or omissions similar to those in respect of which the action is brought.

The Plaintiffs brought an action against the Defendants for permitting sewage to fall into and pollute a stream running through the Plaintiffs' land, and obtained judgment for a perpetual injunction and for damages. The Defendants continued to pollute the stream, and three years after the judgment the Chief Clerk assessed the damages sustained by the Plaintiffs, carrying the assessment down to the date of his certificate:—

*Held* (affirming the decision of *Chitty*, J.), that there was a continuing cause of action, within the meaning of Order XXXVI., rule 58, and that the damages were rightly assessed down to the time of the assessment.

THE action in this case was brought by Mr. *T. Hole*, the owner of a house and lands at *Moorlands*, in the county of *Somerset*, against the guardians of the poor of the union of *Chard*, who were the sanitary authority of the district, to restrain them from polluting a stream which ran through the Plaintiff's land and past his house, by allowing sewage and refuse from certain manufactories to flow into it, so as to be a nuisance to the Plaintiff.

The writ was issued on the 23rd of November, 1888. In May, 1889, the Plaintiff died, and the action was afterwards revived and continued by the devisees under his will.

On the 25th of February, 1890, Mr. Justice *Chitty*, by whom the action was tried, gave judgment in favour of the Plaintiffs, granting a perpetual injunction to restrain the Defendants from permitting the sewage and refuse to pass into the stream so as to cause a nuisance to the Plaintiffs; and he further ordered an inquiry what damages the Plaintiffs had sustained from the date of the death of the original Plaintiff, *T. Hole*, by reason of the nuisance committed by the Defendants; the costs of the inquiry to be reserved, with liberty to all parties to apply. But the operation of the injunction was suspended for six months—that is, till the 25th of August, 1890.

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The Defendants made some alteration in their works, in order to purify the sewage and refuse before they fell into the stream, but did not succeed in abating the nuisance in a satisfactory manner. The consequence was that the Plaintiffs were unable to let or sell the house and land, and sustained thereby considerable loss.

They accordingly moved for a writ of sequestration against the Defendants after the six months had expired. The motion stood over from time to time, and eventually, on the 22nd of January, 1892, the Court, with the Plaintiffs' consent, dismissed the motion, but ordered the Defendants to pay the costs of it.

On the 24th of July, 1893, the Chief Clerk made his certificate, by which he assessed the damages sustained by the Plaintiffs down to the date of the certificate at £2000. The Defendants took out a summons to vary the certificate, and Mr. Justice *Chitty*, on the 1st of November, 1893, reduced the amount of damages to £1150, which he ordered the Defendants to pay to the Plaintiffs, together with the costs of the inquiry.

The Defendants appealed from this order.

*Cozens-Hardy*, Q.C., and *Farwell*, Q.C. (*R. C. Glen*, with them), for the Appellants:—

The damages were assessed by the Chief Clerk on an erroneous principle. The rule on which he professed to proceed was Order XXXVI., rule 58, which is as follows: "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the date of the assessment." But there was no continuing cause of action in this case. Every day that the nuisance complained of continued there was a fresh cause of action. The nuisance was caused by fresh acts of the Defendants, not by the acts done before the writ was issued. Therefore, the Plaintiffs can only have damages assessed to the date of the judgment, or at all events to the end of the six months during which the injunction was suspended: *Whitehouse* v. *Fellowes* (1). If they really suffered damage after this date, their proper remedy was either by bringing a fresh action, or by sequestration for breach of the injunction.

(1) 10 C. B (N.S.) 765, 779.

We also contend that the damages have been calculated on a false system, and are extravagant in amount.

*Byrne*, Q.C., and *Bunting*, contended that the cause of action was continuing, and that the damages were fairly calculated. [They were stopped by the Court.]

LINDLEY, L.J.:—

The principal question raised by this appeal is whether the damage sustained by the Plaintiffs since the judgment for an injunction came into operation is to be taken into account in assessing the damages in the action. The nuisance complained of was the pollution of a stream flowing through the Plaintiffs' land by the discharge into it of sewage and refuse by the Defendants. Mr. Justice *Chitty* granted an injunction restraining the Defendants from permitting sewage or refuse to pass into the stream so as to cause a nuisance to the Plaintiffs; and he further ordered an inquiry what damages the Plaintiffs had sustained from the date of the death of the original Plaintiff by reason of the nuisance committed by the Defendants; and he suspended the injunction for six months—that is, till the 25th of August, 1890. The question raised in the appeal is, What are the damages since the death of the original Plaintiff to which the Plaintiffs are entitled? That depends upon the construction of Order XXXVI., rule 58. Mr. Justice *Chitty* having directed an inquiry as to damages, the Chief Clerk has assessed the damages down to the time of his certificate. The question is whether he was justified in taking account of damage sustained by the Plaintiffs since the date of the grant of the injunction, or rather since the 25th of August, 1890, the date when it came into operation. It is contended on behalf of the Defendants that it was not right in principle to do this; because any nuisance committed after the date when the injunction came into operation gave rise to a fresh cause of action, and was not a continuing cause of action in respect of which the damages could be assessed down to the date of assessment under Order XXXVI., rule 58. What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is

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a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the Defendants would be to render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance. The Judge was, therefore, right in treating it as a continuing cause of action, and in assessing the damages down to the date of the Chief Clerk's certificate.

[His Lordship then considered the question of the amount of damages, and gave his opinion that they were correctly calculated. The appeal was, therefore, dismissed with costs.]

A. L. SMITH, L.J.:—

The principal question in this appeal turns upon the construction of Order XXXVI., rule 58. It is contended by the Appellants, that when the act on which an action is brought is established the cause of action can have reference to that one act and to no other. In my opinion, that is not necessarily so. If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*. It seems to me that there was a connection in the present case between the series of acts before and after the action was brought; they were repeated in succession, and became a continuing cause of action. They were an assertion of the same claim—namely, a claim to continue to pour sewage into the stream—and a continuance of the same alleged right. In my opinion, there was here a continuing cause of action within the meaning of the rule.

[His Lordship then considered the evidence as to the amount of damage sustained by the Plaintiffs, and said that he agreed

with Lord Justice *Lindley* that they were correctly assessed by the learned Judge; and that the appeal altogether failed.]

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DAVEY, L.J., concurred.

Solicitors: *Vandercom, Hardy, Oatway, & Doulton; Walker & Battiscombe,* agents for *Partridge & Cockram, Tiverton.*

M. W.

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## *In re* BRIDGER.
## BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS.

[1892 B. 2675.]

C. A.
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*Nov.* 3, 4;
*Dec.* 5, 11.

*Will—Construction—Gift to Charity of such part of Residue "as may by law be given for Charitable Purposes"—Will made before passing of the Mortmain and Charitable Uses Act,* 1891—*Death of Testator after passing of Act—Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *s.* 9—*Wills Act* (1 *Vict. c.* 26), *s.* 24.

A testator, by his will made before the passing of the *Mortmain and Charitable Uses Act,* 1891, bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, and from and after her decease in trust to pay "such part of his residuary trust estate which may by law be given for charitable purposes" to the *Brompton Hospital*; and as to the remainder of the said residuary trust estate, upon trust for *E. W.* absolutely.

The testator died after the passing of the Act:—

*Held* (affirming the decision of *North,* J.), that the Act applied, and that as the will did not shew any intention on the part of the testator to confine the gift to the hospital to such part of the residue as could by the law as it stood at the date of the will be given for charitable purposes, the hospital was entitled to all the residue, real as well as personal.

THIS was an appeal from a decision of Mr. Justice *North* upon the construction of the will of *Walter Bridger* (1).

By his will, which was dated the 29th of June, 1891, the testator gave, devised, and bequeathed the residue of his real and personal estate to trustees upon trust for sale and conversion and investment of the proceeds; and to pay the income thereof to his wife during her life, and from and after her decease he declared the trust in the following words: "In trust to pay such

(1) [1893] 1 Ch. 44.

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part of my said residuary trust estate which by law may be given for charitable purposes unto the *Brompton Hospital for Consumption;* and as to the rest and remainder of my said residuary trust estate, upon trust for *Elizabeth Williams* absolutely."

The testator died on the 20th of February, 1892. At the date of his death his property consisted of freehold and leasehold houses, money due on mortgage, and pure personalty.

The *Mortmain and Charitable Uses Act*, 1891, was passed on the 5th of August, 1891.

A summons was taken out by the *Brompton Consumption Hospital* against the trustees of the will and *Elizabeth Williams*, to obtain the opinion of the Court as to the effect of the gift to the hospital. Mr. Justice *North* decided that, the testator having died since the passing of the Act of 1891, although his will was made before that date, the Act applied to the gift, and that the hospital was entitled to the whole of the residue, both real and personal. From that decision *Elizabeth Williams* appealed.

*S. Hall*, Q.C., and *H. Terrell*, for the Appellant:—

A statute is not to be construed to have a retrospective effect, so as to alter the construction of an instrument made before it came into operation: *Jones* v. *Ogle* (1); *In re March* (2). The scope of the instrument at the time it was made was to give the pure personalty to the hospital, the realty and impure personalty to the niece. The testator manifestly intended his niece to take something; he had regard to the then state of the law, and intended to apportion his property between his niece and the hospital. The *Wills Act*, s. 24, does not say that whatever a man says in his will is to be construed as if the will was made on the day of his death: *In re Portal and Lamb* (3); and the testator must be taken to have intended to give to the hospital only such property as in the state of the law when he made his will he could give to it.

Sir *A. T. Watson*, Q.C., and *J. T. Prior*, for the hospital:—

The intention of the testator was to give all his property to his

(1) Law Rep. 8 Ch. 192, 195. (2) 27 Ch. D. 166, 169.
(3) 30 Ch. D. 50.

wife for her life, and at her death to give it in charity so far as he could, and he only puts in the niece that she might take what he could not give to a charity. The provision as to legacies cannot have the effect contended for; it is confined to real estate, and the bulk of the testator's property was leasehold. The bequest here is a bequest of all the testator's property answering a particular description—"which may by law be given for charitable purposes," and whatever answers that description at the testator's death must pass by it: *Lady Langdale* v. *Briggs* (1). *In re Portal and Lamb* (2) turned upon whether the will, supposing it was made on the day of the death, described the property comprised in the specific devise in such a way that the property in dispute would have passed by it.

*Ingle Joyce*, for the trustees.

*S. Hall*, in reply.

1893. Dec. 11. LINDLEY, L.J. (after stating the provisions of the will and referring to sects. 5 and 9 of the *Mortmain and Charitable Uses Act* of 1891, proceeded as follows):—

Sect. 24 of the *Wills Act*, 1837, requires that every will shall be construed with reference to the property comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section has been the subject of many decisions, and from it and them it may be taken as now settled, that if a will contains a description of any kind of property, such a description must be held to include and apply to whatever property the testator has at his death which answers the description, unless a contrary intention appears by the will. In *In re Portal and Lamb* the description in the specific devise did not apply to the after-acquired property without stretching the words of the specific devise and defeating the intention of the testator. But, as pointed out in that case, if a testator devises or bequeaths all his property in a particular county or all his Consols to *A.*, and the rest of his estate to *B.*,

(1) 8 D. M. & G. 391, 435. (2) 30 Ch. D. 50.

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*A.* will take whatever property in the county named or whatever Consols the testator has at his death, and will not be confined to the property or Consols which the testator had when he made his will. This section, however, does not by itself quite cover this case, for, although it enables a testator to dispose of property which he has not got when he makes his will, the section does not of itself enlarge his power of disposing of what he then has. This power, however, is, I think, conferred by sect. 9 of the *Mortmain and Charitable Uses Act*, 1891. That section is so worded as to shew that the Legislature intended that the Act should apply to wills made before this date, provided they came into operation afterwards. Combining this section with sect. 24 of the *Wills Act*, the result appears to me to be that, if a testator devises or bequeaths to a charity all the property which he can by law so devise or bequeath, the charity will take whatever property answers this description at the testator's death, and not only that which answered the description when he made his will. Such a devise or bequest would, I apprehend, clearly include property which a testator acquired a right to dispose of under a general power conferred upon him after he made his will. An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to. This is quite consistent with *Jones* v. *Ogle* (1) and *In re March* (2). The foregoing reasoning appears to me to decide this case in favour of the *Brompton Hospital.*

We were asked to read the gift to the hospital as a gift of pure personal estate. But it is not right to substitute one expression for another, and to treat the two as synonymous when their legal effects are, or may be, very different. For the same reason it is not right to insert the word "now," for that might make all the difference by shewing an intention to exclude the operation of sect. 24 of the *Wills Act*: See *Cole* v. *Scott* (3) and other decisions of that class.

(1) Law Rep. 8 Ch. 192. (2) 27 Ch. D. 166. (3) 1 Mac. & G. 518.

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We were further asked to say that the testator evidently intended to give his wife's niece something, and that it would be contrary to his intention that she should have nothing. This argument is, in my opinion, by far the strongest in her favour; but upon reflection I think it ought not to prevail. I have no doubt that the testator thought that she would get something; but I see no indication of any intention to prefer her to the *Brompton Hospital.* His intention was precisely the contrary: he intended to give all he could to the hospital, and to give her only what he could not give to it. We must find an intention to deprive the hospital of something which by law he could give it. Nothing short of that satisfies the words in sect. 24, or amounts to a contrary intention appearing by the will. For these reasons I think the appeal must be dismissed with costs.

A. L. SMITH, L.J.:—

I concur in the judgment of Lord Justice *Lindley*, and also in the judgment which Lord Justice *Davey* is about to deliver.

DAVEY, L.J.:—

The *Mortmain and Charitable Uses Act*, 1891, was passed on the 5th of August, 1891. It made a material and substantial alteration in the law relating to charitable gifts, because it enabled impure personalty and land, subject to certain restrictions, to be given to charitable purposes. It altered the definition of "land" in the *Mortmain and Charitable Uses Act*, 1888; but it was not an Act dealing with the construction of wills, or the meaning of words used in wills. It was, however, intended to make, and did make, a substantial alteration in the law, which would affect the operation of wills coming within its provisions. By the 9th section it is enacted that the Act shall only apply to the will of a testator dying after the passing of the Act.

The testator in the case before us made his will on the 29th of June, 1891, and, therefore, before the passing of the Act, containing the gift which I need not read again. The testator died on the 20th of February, 1892. In my opinion the Act of

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1891 does not affect or alter the meaning of the words used by the testator. What would have been the construction of the gift if the testator had used the word "now," "which may now by law," &c., I do not pause to inquire. But, having regard to sect. 24 of the *Wills Act*, I am of opinion that the true meaning and effect of the words used is to pass all property of the testator at the time of his death which could by law be given for charitable purposes. This is in accordance with the decisions on specific gifts. If the words describe a particular property which the testator had at the date of his will, that and that alone will pass. This was the decision of this Court in *In re Portal and Lamb* (1), where the Court differed from Lord Justice *Kay* in the Court below, not on the law, but on the construction of the language. But where the specific gift is generic, as "all my lands in the parish of *Dale*," it will, by force of the *Wills Act*, pass all the testator's lands in that parish at the time of his death: *Doe* v. *Walker* (2). What difference has the Act of 1891 made as regards the gift before us? I adopt the language of the late Master of the Rolls, Sir *G. Jessel*, in *Hasluck* v. *Pedley* (3), cited by Lord Justice *Fry* in *Constable* v. *Constable* (4). Speaking of the *Apportionment Act*, Sir *G. Jessel* says: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of *Blackacre*, before the Act, carried the accruing rents: now it does not: not because the meaning of *Blackacre* has been altered, but because the legal effect of the devise is different." So here, it appears to me that the bequest of everything which could by law be given to charitable purposes operates upon something which, but for the Act of 1891, it could not have operated upon. I am, therefore, of opinion that the judgment of Mr. Justice *North* must be affirmed.

Solicitors: *Stanley Evans; Leathley & Willes.*

(1) 30 Ch. D. 50.
(2) 12 M. & W. 591.
(3) Law Rep. 19 Eq. 271, 274.
(4) 11 Ch. D. 681, 686.

M. W.

## *In re* ELCOM.
## LAYBORN *v.* GROVER WRIGHT.

[1893 E. 822.]

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CHITTY, J.,
*Nov.* 2, 4, 22.
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*Dec.* 12, 13.

*Malins' Act* (20 & 21 *Vict. c.* 57)—*Instrument "made after* 31 *Dec.* 1857" —*Will republished after the day.*

A testatrix, by will made before the 31st of December, 1857, bequeathed pecuniary and specific legacies, and gave her residuary estate to trustees in trust for conversion, and to hold the fund in trust for Mrs. *W.* for life, and after her death for her children. She declared that the "several pecuniary legacies" bequeathed to such persons as should be married women should be for their separate use. After the 31st of December, 1857, she made a codicil to her will by which she made a considerable increase in the amount of her pecuniary legacies, but did not otherwise affect the residuary estate. She died in 1866. In 1868 one of the daughters of Mrs. *W.*, with the concurrence of her husband, by deed duly acknowledged, assigned her reversionary share in the residuary estate to a purchaser, treating herself as empowered by sect. 1 of *Malins' Act* to assign her interest:—

*Held*, by the Court of Appeal (affirming the decision of *Chitty*, J.), that the assignor did not become "entitled under an instrument made after the 31st of December, 1857," for that she derived title under the will which was made before that date, and that the will and codicil could not for this purpose be treated as together forming one instrument which was not "made" until the codicil was executed:

*Held*, also, that her share of residue did not come within the words "pecuniary legacies," and, therefore, was not given to her separate use:

*Held*, therefore, that the share did not pass by the assignment.

*LOUISA ELCOM*, by will dated the 13th of March, 1856, after giving various pecuniary legacies and specifically bequeathing her scrap-book, her household furniture and effects, and her leasehold messuage in which she resided, gave the residue of her estate, real and personal, to trustees upon trust to convert it into money, and out of the proceeds pay her debts, funeral and testamentary expenses, the expenses of sale and conversion, "and the legacies hereinbefore bequeathed, or which I may bequeath by any codicil to this my will," and then to purchase or set apart £400 bank annuities, and hold them on the trusts therein mentioned, and to purchase a life annuity of £20 for a niece, and to invest "the surplus or residue of my said

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estate" in manner therein mentioned, and pay the income to the testatrix's niece, Mrs. *Wright*, during her life, for her separate use, and after her death hold the trust funds in trust for all and every the children and child of Mrs. *Wright*, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares, with the usual powers of advancement, maintenance, and education. "And I hereby direct and declare that the several pecuniary legacies hereinbefore bequeathed to such person or persons as is, are, or shall be a married woman or married women, shall be for their respective separate use, and free from the debts, control, or interference of their respective husbands." The testatrix then directed that if at the time of her decease any person or persons to whom any pecuniary legacy or legacies was or were thereinbefore bequeathed should be a minor or minors, it should be lawful for, but not imperative on, the trustees to invest such legacy or legacies, and either to invest and accumulate the income therefrom, or to apply it for the maintenance, education, or otherwise for the benefit of such legatees respectively.

The testatrix made a codicil dated the 28th of April, 1864, to her will, by which she only gave a number of pecuniary legacies, some of which she expressed to be in addition to the legacies given to the legatees by her will. She did not in terms confirm her will.

The testatrix died on the 19th of April, 1866.

Between the dates of the will and codicil the Act 20 & 21 Vict. c. 57, came into operation, which enabled a married woman, with the concurrence of her husband, by deed acknowledged by her in manner prescribed by the *Fines and Recoveries Act*, to dispose of every future or reversionary interest, whether vested or contingent, in any personal estate "to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned)."

In 1868 Mrs. *Hamilton* (one of the daughters of Mrs. *Wright*) and her husband, by deed acknowledged by her in manner required by the *Fines and Recoveries Act*, assigned for a valuable consideration all her reversionary share and interest in the

residuary estate of the testatrix to *Thomas Layborn* absolutely; and he afterwards sold and assigned it absolutely to *T. R. Layborn*, the present Plaintiff.

On the death of Mrs. *Wright* the Plaintiff commenced this action, claiming Mrs. *Hamilton's* share from the trustees of the will.

The action came on for hearing before Mr. Justice *Chitty* on the 2nd of November, 1893.

*Byrne*, Q.C., and *Hull*, for the Plaintiff:—

The will and codicil together constitute "the instrument" under which Mrs. *Hamilton* was entitled. The whole testamentary disposition must be considered. But if this proposition is too wide, then the execution of the codicil amounted to a republication of the will: *In re Earl's Trust* (1). Under the 34th section of the *Wills Act* the effect of the republication of a will by a codicil, is the same as if the testator had, at the date of the codicil, made a will in the words of the will so republished: *Winter* v. *Winter* (2). The effect of a codicil is to reiterate the words of the will: *In re Blackburn* (3).

[*In re Smith* (4) was also referred to.]

For these reasons we contend that Mrs. *Hamilton* made an effective disposition of her reversionary interest; and that the deed is now binding on her.

*Vaughan Hawkins*, for Mrs. *Hamilton*:—

First, I say that "the instrument" means the particular instrument under which the married woman is entitled, and not the whole scheme of testamentary disposition. Secondly, I say that "the instrument" in the present case is the will only, not the codicil, or, in other words, "the instrument under which" Mrs. *Hamilton* was "entitled" is equivalent to the instrument containing the gift, that is, the will, notwithstanding the effect of the codicil, which, to a certain extent, cut down the original gift.

Thirdly, assuming I am wrong on the first two points, then I

(1) 4 K. & J. 673.
(2) 5 Hare, 306.
(3) 43 Ch. D. 75.
(4) 45 Ch. D. 632.

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say that the instrument, or all the instruments, under which a married woman claims to be entitled must be made after the operation of the Act 20 & 21 Vict. c. 57: *In re Butler's Trusts* (1), which was a decision on this very Act, and which shews that it applies only to cases where the married woman is entitled wholly under an instrument made after the prescribed date.

Then, again, the republication of a will by a codicil at a time subsequent to the date fixed for the commencement of the Act, does not deprive it of its character of an instrument already made: *Rolfe* v. *Perry* (2). True, that was a decision under *Locke King's Act* (17 & 18 Vict. c. 113), but the two cases are *in pari materiâ*. There is a great difference between the effect of a codicil and a mere will: *Willet* v. *Sandford* (3); *Gurney* v. *Gurney* (4); *In re Taylor* (5). All the expressions that have been used as to a codicil "republishing or reiterating a will," or "drawing down the date of the will to its own date," must be considered as referring to the particular case then under discussion, and have no direct bearing on the present case.

[He also referred to *Tempest* v. *Tempest* (6); *Bizzey* v. *Flight* (7); *Drinkwater* v. *Falconer* (8); *Sidney* v. *Sidney* (9); *Farrer* v. *St. Catherine's College, Cambridge* (10); *Pigott* v. *Waller* (11); *Fuller* v. *Hooper* (12); *Sherer* v. *Bishop* (13); *Wilson* v. *O'Leary* (14).]

For these reasons I submit that the deed is not now binding on Mrs. *Hamilton*.

*Byrne*, in reply:—

The "instrument" here is the will and codicil, "the aggregate of the testatrix's testamentary intentions, so far as they are manifested in writing, duly executed according to the statute": *Lemage* v. *Goodban* (15); *Green* v. *Tribe* (16). So far as the Act is

(1) I. R. 3 Eq. 138.
(2) 3 D. J. & S. 481.
(3) 1 Ves. Sen. 178, 186.
(4) 3 Drew. 208.
(5) 36 W. R. 683.
(6) 2 K. & J. 635.
(7) 3 Ch. D. 269.
(8) 2 Ves. Sen. 623, 626.
(9) Law Rep. 17 Eq. 65.
(10) Ibid. 16 Eq. 19.
(11) 7 Ves. 98, 115.
(12) 2 Ves. Sen. 242.
(13) 4 Bro. C. C. 54, 59.
(14) Law Rep. 7 Ch. 448.
(15) Ibid. 1 P. & M. 57, 62.
(16) 9 Ch. D. 231.

concerned, and apart from the authorities, our contention is the correct one. *Rolfe* v. *Perry* (1) is a decision on another Act and does not apply; *Locke King's Act* was not an enabling Act, as *Malins' Act* is.

1893. Nov. 22. Chitty, J.:—

The question is whether the deed executed after the 31st of December, 1857, by Mrs. *Hamilton*, then a married woman, and duly acknowledged by her in the manner required by the Act commonly called *Malins' Act* (20 & 21 Vict. c. 57), was effectual to pass her reversionary interest in personal estate, the precise point being, whether she was entitled to the reversionary interest under an instrument made after the 31st of December, 1857, within the meaning of the Act. She acquired the reversionary interest under the testamentary dispositions of *Louisa Elcom.* By her will, made before the 31st of December, 1857, the testatrix bequeathed her residuary personal estate, after payment of the legacies thereinbefore bequeathed or which she might bequeath by any codicil, upon trusts under which Mrs. *Hamilton* took the reversionary interest in question. After the 31st of December, 1857, the testatrix made a codicil, whereby she bequeathed additional pecuniary legacies. The codicil is expressed to be a codicil to her last will and testament. It does not in terms confirm her will, but, as was admitted on both sides in the argument, nothing turns on that circumstance.

In support of the deed an argument was founded on the general object of the Act. Before it was passed, a married woman could not effectually dispose of her reversionary interest in personalty except where it was limited to her for her separate use or where a special power of disposition was conferred on her. The object of the Act, as appears on the face of it, was to enable her by acknowledged deed to dispose of her reversionary interest in personalty, except where she is restrained from alienation and where the interest is acquired under her marriage settlement. The Act is not retrospective; it is confined to dispositions made by her after the 31st of December, 1857, and the interests to which she shall be entitled under any instrument made after that

(1) 3 D. J. & S. 481.

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date. A consideration of the general object of the Act does not throw any material light on the meaning of the particular words used. All that can be justly said is, that the Act enlarges the capacity of a married woman, in the manner, and to the extent, prescribed by the Act and subject to the provisions and restrictions therein contained.

In support of the deed it was pointed out that the words in the proviso at the end of the first section, "shall become entitled by virtue of any deed, will, or instrument," shew that "any instrument" in the previous enacting part of the same section include a will. This is clear, and would be so without the proviso. Then it was said that the word "will" means the aggregate of a man's testamentary intentions, so far as they are manifested in writing duly executed according to the statutes relating to wills; and in support of this proposition the judgment of Lord *Penzance* in *Lemage* v. *Goodban* (1) was cited. Thereupon it was urged that no man could be properly said to have made his will until he had finished his last codicil; and, applying this reasoning to the present case, the conclusion arrived at was, that the testatrix's will and codicil, taken together, constituted her will, and that her will was therefore made after the 31st of December, 1857. But the question is whether this reasoning has any application to the statute under consideration. By using the term "instrument" the Legislature appears to have directed its attention to the particular instrument under which the married woman is entitled, and not to the set of instruments which together make up the will. Mrs. *Hamilton* is entitled under the will to the reversionary interest thereby bequeathed, subject only to the diminution contemplated by the will itself of the amount of the residue by legacies left by the codicil; and the will itself, regarded as a separate document, was actually made before the date mentioned in the Act. The Act treats the date at which a testator's testamentary dispositions come into operation by his death as immaterial. Persons still living at the passing of the Act (August 25, 1857) who had already made their wills, and persons who afterwards made their wills before or on the 31st of December, 1857, were in effect told that their wills would be left

(1) Law Rep. 1 P. & M. 57, 62.

to operate, in regard to married women, under the law as it stood at the passing of the Act; that it was not necessary for them to insert any restraint upon alienation in order to prevent the married woman from disposing of her interest. In dealing with the Act I am bound to take the words as I find them, and to construe them in their ordinary and natural sense. I think the words refer to the particular instrument containing the gift, which in this case is the will, and that this instrument was made within the meaning of the Act at the time when it was duly executed and attested as required by law. In his able and learned argument against the deed, Mr. *Vaughan Hawkins* referred to various expressions which have been used in reference to the effect of a codicil on a will—such as, "a codicil is part of the will"; "a codicil republishes the will"; "it incorporates or reiterates the will"; or "draws down the date of the will to its own date," and the like; and he contended, and as I think rightly, that all such expressions must be considered in reference to the particular case which was under discussion. They have no direct bearing on this case.

Reference was made to the 34th section of the *Wills Act* (1 Vict. c. 26), which enacts that the Act shall not extend to any will made before the 1st of January, 1838, and that every will re-executed or republished or revived by any codicil shall, for the purposes of that Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. The operation of the section is, therefore, confined to the purposes of that particular Act, and there is no such enactment in *Malins' Act*. The section, so far as it goes, supports the conclusion at which I have arrived.

Of the numerous authorities cited at the Bar, I think it necessary to refer only to *Rolfe* v. *Perry* (1). The question there was the meaning of the words, "will, deed, or document already made or to be made before January 1, 1855," in *Locke King's Act* (17 & 18 Vict. c. 113). In that case there were two wills, both duly executed and attested, one before and the other after the date mentioned. Lord *Westbury* held that the words "already made" referred to the actual making of the first will, and declined to

(1) 3 D. J. & S. 481.

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apply any doctrine of republication by the second will. The decision, no doubt, was on a different Act, in which the words were somewhat different; but it has a close application to the present case, and it at least shews that the word "will" in an Act of Parliament may be properly construed as referring to a particular instrument.

For these reasons, I hold that the acknowledged deed was not within the Act, and therefore that Mrs. *Hamilton* is not bound.

W. C. D.

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The Plaintiff appealed from this decision. The appeal came on for hearing on the 12th of December, 1893.

*Byrne*, Q.C., and *Hull*, for the Appellant:—

We contend, in the first place, that the will and codicil constituted one instrument; consequently Mrs. *Hamilton* was entitled under an instrument made after the 31st of December, 1857, and therefore her assignment was within 20 & 21 Vict. c. 57. We also say that the gift of the residuary estate in the will was, so far as the personal estate was concerned, a pecuniary legacy within the meaning of the will, and, therefore, given to the married legatees for their separate use. In this view Mrs. *Hamilton* would have power to dispose of it, and no question could arise under the Act. With respect to the first point, it must be remembered that the Act was an enabling Act, and was intended to prevent the intentions of assignors from being defeated and injustice being done; it ought, therefore, to be construed liberally. The codicil in this case, although not in express terms confirming the will, did so in effect, and the two documents became one instrument. One was incomplete without the other: *In re Blackburn* (1). The cases under the apportionment Act throw some light on the case: *Hasluck* v. *Pedley* (2); *Constable* v. *Constable* (3); *Lawrence* v. *Lawrence* (4); and their tendency is in our favour.

[DAVEY, L.J.:—Can you say that a will republished by

(1) 43 Ch. D. 75.
(2) Law Rep. 19 Eq. 271.
(3) 11 Ch. D. 681.
(4) 26 Ch. D. 795.

codicil after the passing of the Act is an instrument made after the passing of the Act?]

We say that what is to be looked to is the whole testamentary disposition, which consists of the will and codicils taken together: *Hasluck* v. *Pedley* (1); *In re Smith* (2); *Lemage* v. *Goodban* (3); *Skinner* v. *Ogle* (4); *Jarman* on Wills (5). Republication brings the will down to the later date. Here is an Act enabling married women to dispose of property of which they could not dispose before, and an exception is made in order that the intention of a testator who had made his will relying on the old state of the law might not be defeated. If he republishes his will the reason ceases. *Rolfe* v. *Perry* (6) was much relied on below; but none of the reasoning in that case applies here. In that case, a similar expression to that in the Act now in question was inserted for an entirely different purpose. The case of *In re Butler's Trusts* (7) is quite distinct; the first instrument being a deed as to which there could not be anything like republication.

We contend further, that the share was given to Mrs. *Hamilton's* separate use. "Legacy" includes residuary personal estate: *Ward* v. *Grey* (8). *Gaskin* v. *Rogers* (9) supports the taking the word "legacies" in a wide sense, and if the share is a legacy the will gives it to the separate use of the legatee.

*Vaughan Hawkins*, for the Respondents, was not called upon.

LINDLEY, L.J.:—

I am not surprised at this appeal. The Court has no inclination to help a person who has received the purchase-money for property to get back the property; but whatever our inclinations may be, we must administer the law. The testatrix in this action made in 1856 a will by which she gave her residuary real and personal estate to trustees in trust, to convert it, invest the proceeds, and pay the income to her niece Mrs.

(1) Law Rep. 19 Eq. 271.
(2) 45 Ch. D. 632.
(3) Law Rep. 1 P. & M. 57, 62.
(4) 1 Rob. Ecc. Rep. 363.
(5) Chap. viii.
(6) 3 D. J. & S. 481.
(7) I. R. 3 Eq. 138, 142.
(8) 26 Beav. 485.
(9) Law Rep. 2 Eq. 284.

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*Wright* for life, and then divide the proceeds among the children of Mrs. *Wright* who being sons should attain twenty-one, or being daughters should attain that age or marry. In 1864 she made a codicil to her will by which she gave a number of pecuniary legacies, but did not otherwise deal with her residuary estate. In 1866 she died. In 1868 one of Mrs. *Wright's* daughters and her husband by deed acknowledged assigned to *Layborn* her share of the residue which was then reversionary, Mrs. *Wright* being alive, and the question is whether this assignment was effectual.

By the Act 20 & 21 Vict. c. 57, passed in the interval between the dates of the will and codicil, a married woman was enabled, with the concurrence of her husband by deed acknowledged in manner provided by the *Fines and Recoveries Act*, "to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the 31st day of December, 1857 (except such a settlement as after mentioned)." The short question is whether this lady became entitled under an instrument made after the 31st of December, 1857. If she did, the assignment is good; if she did not, it is invalid.

The will was made in March, 1856. Whether it would remain in force depended on the subsequent proceedings of the testatrix. She made a codicil in 1864, after the 31st of December, 1857. By this codicil she bequeathed various pecuniary legacies, and thereby diminished the residue, but did not otherwise affect the disposition of it. She did not in terms republish her will; but that, in my judgment, is quite immaterial. It is ingeniously argued that her will is made up of the aggregate of all her testamentary instruments, and for many purposes that is so; but can it be said that this lady became entitled to this reversionary interest under an instrument made after the 31st of December, 1857? I think that it cannot by any ingenuity be made out that she did. How do you "make" a testamentary instrument? By signing it with such formalities as the law requires. Under what instrument does Mrs. *Hamilton* derive her title? Under the will, and the will was made before the Act.

I do not think it necessary to refer to cases—there are none that throw much light upon the point. The case that comes nearest is *Rolfe* v. *Perry* (1), and it makes against the Appellant. But we do not want cases, for the language of the Act is plain.

It was then contended that this share was given to Mrs. *Hamilton* for her separate use. The testatrix begins her will by giving legacies, pecuniary and specific, to various persons. Then she disposes of her furniture, and gives the residue to trustees in trust to sell, to pay out of the proceeds her debts, funeral and testamentary expenses, the expenses of sale, and the legacies which she has bequeathed or shall bequeath by codicil; and, after setting apart a sum of stock and purchasing a life annuity, to invest the residue, and hold it in trust for Mrs. *Wright* for life, and after her death for her children who attain twenty-one or marry, with the common power of maintenance and advancement. She then directs that the several pecuniary legacies thereinbefore bequeathed to such persons as were or should be married women should be for their separate use; and that if at her decease any person to whom any pecuniary legacy was bequeathed should be a minor, it should be lawful for the trustees to invest it, and to accumulate the income, or to apply it for the benefit of the legatee. It is contended that the expression "pecuniary legacies" includes this share of residue. I think that it is doing violence to language to describe a share of residue as a pecuniary legacy; and here it is plain that the testatrix did not intend to do so, for she gives a power of maintenance out of the income of pecuniary legacies, and a separate power of maintenance out of the income of shares of the residue.

I am, therefore, of opinion that, in 1868, Mrs. *Hamilton* had no power to assign this share of residue.

A. L. SMITH, L.J.:—

I also am of opinion that this appeal fails. The question is whether the share of a married woman passed to her assignees or not, and this turns upon *Malins' Act*, the point being whether she became entitled to the share under an instrument made after

(1) 3 D. J. & S. 481.

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the 31st of December, 1857. Now, under what instrument did she become entitled? Clearly under the will, which was dated in 1856; so that, if the matter rested here, there would be nothing to argue. But it is said that, as the testatrix happened to make a codicil after that date, the whole of her testamentary instruments are to be taken as together forming one will, which is not made till the last of those instruments is executed. But the only operation of the codicil on the residue is to diminish it; and it would be strange to hold that Mrs. *Hamilton's* title is derived wholly or partially under an instrument the only effect of which as to her was to take from her something which she had taken under the will.

As to whether this share of residue comes under the description of "pecuniary legacies," I agree with what the Lord Justice *Lindley* has said.

DAVEY, L.J.:—

I have no desire to stretch the words of the Act against the Appellant; but if we were to accede to his argument we should be stretching them in his favour. The Act applies only to interests to which married women become entitled under instruments made after the 31st of December, 1857. "Instrument" may be read "will or other instrument"; and it means some document properly executed. "Will" may include the whole of a testator's testamentary dispositions, but not where it is used as synonymous with an "instrument." The matter is put in its true light by *Lemage* v. *Goodban* (1), and the passage cited by Lord *Penzance* in that case from *Williams* on Executors. Mr. Justice *Williams* says (2): "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as *Swinburne* says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as

(1) Law Rep. 1 P. & M. 57. (2) 5th Ed. vol. i. p. 140.

together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." Lord *Penzance*, after citing this passage, goes on to say (1): "This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute." For ascertaining the testator's testamentary intentions, you must look at the whole of the instruments he has executed, and for the purposes of probate they may be said to make up his will. But in the present case you cannot say that Mrs. *Hamilton* is entitled under the aggregate of them; everyone would say that the instrument under which she is entitled is the will.

As to the point relating to separate use, I agree that *primâ facie* the expression "pecuniary legacies" does not include a share of residue, and it is only by force of the context that it can do so. Here the context tends to rebut the Appellant's contention.

Solicitors: *George Brown, Son, & Vardy; W. J. Fraser.*

(1) Law Rep. 1 P. & M. 62.

H. C. J.

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Dec. 14, 15.

## *In re* SEAL.
## SEAL *v.* TAYLOR.

[1889 S. 1492.]

*Will—Falsa Demonstratio—Limitatio vera.*

*S.* devised to his wife during widowhood "my residence called *S. House* and premises thereto as the same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of *S. House* and the stable and coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house, and the sons were in occupation till his death:—

*Held* (affirming the decision of *Chitty*, J.), that the devise included the room over the coach-house, but did not include the rest of the stable and coach-house nor the office, for that the property which was in the testator's own occupation answered the whole of the description, and that being so, the Court could not enter into the question of inconvenience, and reject the reference to occupation as *falsa demonstratio.*

*Travers* v. *Blundell* (1) distinguished.

*Stanley* v. *Stanley* (2) observed upon.

*SAMUEL SEAL*, a retired stone merchant, by will dated the 19th of March, 1885, devised to his wife during widowhood a house and land purchased by him from *Francis Jackson.* After making various other devises and bequests, specific and pecuniary, he gave his residuary real and personal estate unto and to the use of his trustees upon trust during his wife's widowhood to manage the same, and divide the income among such children of his, and in such manner as therein mentioned, and after the decease or marriage of his wife to convert the same into money and distribute the proceeds among his children in manner therein mentioned.

By codicil, dated the 19th of January, 1888, the testator revoked the above devise to his wife, "and in lieu thereof I devise my residence called *Stoneleigh House* and premises thereto as the same are now occupied by me, and after her death or marriage again, I devise the said residence and premises to my son *Joseph Seal* for his life, and after his death" to the uses

(1) 6 Ch. D. 426. (2) 2 J. & H. 491.

therein contained in favour of his children, with divers limitations over. He directed that his wife and his son *Joseph* should as long as they should be respectively seised of the residence and premises for life, keep the same in good repair and condition, and keep the same insured against loss or damage by fire in the names of his trustees, and up to the full value of the said dwelling-house and buildings thereto belonging.

The testator died shortly after making his codicil, and on the 27th of May, 1889, an order was made on originating summons, directing the usual accounts and inquiries as to his real and personal estate.

*Stoneleigh House*, in which the testator resided, was a house which he had built, standing in grounds of about an acre, bounded on the north-easterly side by a high road, and on the south-easterly side by a lane, being part of a piece of land of between three and four acres which he had purchased in 1849. The front entrance to the house was by a drive through the grounds from the high road. Adjoining to the grounds of *Stoneleigh House* was a house called *Stoneleigh Lodge* standing on other part of the purchased property and fronting to the high road. And there were some cottages fronting to the road which also formed part of the purchase. At the rear of *Stoneleigh House* and adjoining to it was a stable, and there was also in the yard an office standing near the house, and a wash-house adjoining the office. The stable was approached by a private road leading out of the lane and forming the south-westerly part of the grounds attached to the house. Beyond the private road lay a field of about two acres forming other part of the property purchased in 1849. Over part of the stable was an upper room, the only access to which was through the house, and which was occupied as part of the house. With this exception the stable and the office were not in the testator's occupation at the time of making his codicil or at his death, having for several years been let along with the two acre field at one rent to two of his sons who were carrying on business as stone merchants, and had them for the purposes of the business. The testator kept a carriage in the stable and used to go to the office to write his letters.

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The Chief Clerk by his certificate reserved for the consideration of the Court the question how much of the property about *Stoneleigh House* passed under the devise to the widow during widowhood.

Mr. Justice *Chitty* by order on further consideration made a declaration that the devise in question "included the following premises and no other, namely, the freehold house and garden and premises at *Sandal Magna, Yorkshire,* known as *Stoneleigh House,* including the room over the coach-house used as a bedroom and communicating with the house, and the wash-house adjoining the office, and the soil of the private road, but subject as to such road to a right of way for all purposes with carriages and horses thereon to the stable and stableyard, and also for foot passengers only to the office, being the premises (except as to the bed-room over the coach-house which is not shewn on the plan) edged with a pink line and coloured pink on the map exhibit to the affidavit of *S. Seal* filed this day." The parts coloured pink included the acre of ground, except the stable and office, which were coloured blue.

The persons interested in *Stoneleigh House* under the devise appealed.

*Warmington,* Q.C., and *A. à B. Terrell,* for the Appellants:—

The construction of the will contended for by the Respondents is unreasonable. It could never have been intended by the testator that the office should not pass with the house. The words "as the same are now occupied by me" are simply a "*falsa demonstratio.*" In *Hardwick* v. *Hardwick* (1) Lord *Selborne* lays down the rule that, "if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded." Here the leading words of description are, "my residence called *Stoneleigh House* and premises thereto"; and the words, "as the same are now occupied by me" are a

(1) Law Rep. 16 Eq. 168, 175.

mere reference not in perfectly accurate terms to the fact that he lived there. *Travers* v. *Blundell* (1) is strong in our favour; all the reasoning there applies to the present case, only much more strongly. The extreme inconvenience of such a severance as is made by the order under appeal shews that the testator cannot have had such an intention as is given effect to by that order. We claim the whole of the house and premises, including the office, stable and coach-house, but not the field.

*Farwell*, Q.C., and *Butcher*, for the Respondents:—

The Appellants give up the field, and thereby abandon their ground that the reference to occupation is to be treated as *falsa demonstratio*. The reference to occupation here cannot be treated as *falsa demonstratio*. The law on the subject is laid down by *Erle*, C.J., in *Webber* v. *Stanley* (2), which is the leading authority on the subject. And the rule is that where there is a subject-matter to which all the terms apply no part of them can be rejected as *falsa demonstratio*. This rule was followed by the Exchequer Chamber in *Smith* v. *Ridgway* (3). The object of the devise here evidently was to provide the widow with a residence; the testator's ideas were directed to the premises which he occupied. He thought that what was a residence good enough for himself was good enough for his widow and his son after him, and he did not think of giving them more. "As" implies "so much as"—it is a word of limitation as distinguished from description. In *Smith* v. *Ridgway* the Court pointedly approves of *Webber* v. *Stanley*, and of the rule of taking words which apply to part only of the whole property as words of limitation and not of description. Lord *Hatherley*, in *Stanley* v. *Stanley* (4), appears to have departed from this principle on the ground that the extrinsic evidence that the testatrix intended her disposition to apply to the whole estate was overwhelming. Here it is not, for it is natural that a testator should consider that what he occupied as a residence was a proper subject for a separate disposition, and the argument *ab inconvenienti* hardly applies. But whether Lord *Hatherley's* decision is sound may be doubted, and it was

(1) 6 Ch. D. 436.
(2) 16 C. B. (N.S.) 698, 752.
(3) Law Rep. 1 Ex. 331.
(4) 2 J. & H. 491.

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disapproved of in *Webber* v. *Stanley* (1). A right of way to the stable and office is given by implication, *Pearson* v. *Spencer* (2); and has been carefully limited by the order to such a right of way as the tenants enjoyed.

*Greenwood*, for the trustees.

*Terrell*, in reply:—

The field was given up as not coming within the words "premises thereto"; and this reason does not apply to the stable and office which stand in the yard attached to the house. The Appellants' argument comes to this, that the words are not to be taken as they are, but that "so much" is to be inserted. The subsequent words of the codicil are in our favour—the successive occupants are to keep the "residence and premises" in good repair and keep them insured to the full value of "the dwelling-house and buildings thereto belonging." Moreover the office and stable were in a sense in the testator's occupation. He habitually wrote his letters in one and kept a carriage in the other. This was, no doubt, by sufferance; but he cannot have intended his devisees to have a less beneficial occupation than he had himself enjoyed.

LINDLEY, L.J.:—

This is not a case of so much difficulty as I at first thought. On the opening of the appeal it seemed to me on reading the language of the will, and looking at the plan, that the whole of the messuage, with its appurtenances, must have been intended to pass; but we must, in order to judge of the case, see how the property stood at the time of the codicil and of the testator's death. Its state was the same at each of these periods. The testator when he made his will had a residence called *Stoneleigh House*. Adjoining the grounds belonging to the house, there was on one side a house called *Stoneleigh Lodge*, with some cottages, and on another side a field of two acres. The testator lived with his wife in *Stoneleigh House*. Two of his sons were stone merchants. He himself had carried on the same business, but had retired. He let to the two sons at one rent for the pur-

(1) 16 C. B. (N.S.) 698. (2) 1 B. & S. 571.

poses of their business the two-acre field, the stable belonging to *Stoneleigh House*, except one first-floor room, the only access to which was from the house, and an office in the yard, with the exception of a wash-house annexed to it. He and his wife occupied *Stoneleigh House* and the buildings belonging to it, except those parts of the premises which were in the occupation of the two sons. The sons had access to the stables and office, not by the front drive, but by a private way at the back, which seems to have been taken out of the two-acre field. By his will the testator did not specifically devise *Stoneleigh House*; he gave to his wife during widowhood another house, and *Stoneleigh House* was not mentioned, but passed under the residuary devise to his trustees. By a codicil he revokes the devise to his wife, and devises to her during widowhood "my residence called *Stoneleigh House* and premises thereto as the same are now occupied by me." What is meant by that expression? If we read it as a whole there is no difficulty in applying it to the property. The first part of the description is not complete, "*Stoneleigh House* and premises thereto"—some word has been left out. The testator completes it by saying, "as occupied by me." We have no difficulty in finding property which answers the whole of this description. Mr. *Warmington* says, take the devise as a devise of *Stoneleigh House*, and reject "as the same are now occupied by me," as a *falsa demonstratio*. If we were to do so we should be doing what, in the opinion of the Court of Exchequer Chamber (1), *Wood*, V.C., wrongly did in *Stanley* v. *Stanley* (2). We should be violating the rules laid down in *Webber* v. *Stanley* (3) if we were to accede to the Appellants' contention simply because we saw that inconvenience would result from the other construction which is in strict conformity with the words. Personally, moreover, I think we are giving effect to and not defeating the testator's intention. The appeal, therefore, must be dismissed.

A. L. SMITH, L.J.:—

The question we have to decide is whether the words, "as the same are now occupied by me," are a limitation or a "*falsa*

(1) 16 C.B. (N.S.) 753. (2) 2 J. & H. 491. (3) 16 C.B. (N.S.) 752.

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*demonstratio.*" I do not wish to decide whether this case comes within the rule in *Travers* v. *Blundell* (1) or the rule in *Webber* v. *Stanley* (2) and *Smith* v. *Ridgway* (3). If extrinsic evidence is not resorted to, the construction of the codicil is plain—it is a devise of property in the testator's own occupation. If the extrinsic evidence is admitted, I think it is in favour of the Respondents, not of the Appellants. Some years before the date of the codicil the testator had demised the stable, office, and field to two of his sons for the purposes of their business, and from that time till the making of the codicil and thenceforth till the testator's death the sons occupied them. What could be more natural than that the testator by his codicil should provide for the occupation by his widow of what he had along with her occupied for so many years, and that he should have no intention to give her anything more. The appeal will be dismissed.

DAVEY, L.J.:—

After the full and exhaustive discussion this case has received I have come to the conclusion that we cannot reverse the decision under appeal. The difficulty is to apply to the facts the rules of law which have been laid down, and the difficulty in applying them is increased by the fineness of the distinctions.

As Lord Justice *A. L. Smith* says, the question is whether the words, "as the same are now occupied by me," are words of description or of limitation. That is a question of construction, and I am under the impression, though I do not give it as my concluded opinion, that in considering it we cannot look at extrinsic evidence. We must first construe the words, and having done so, then look at the extrinsic evidence to see whether there is anything which those words fit. The whole description is "my residence called *Stoneleigh House* and premises thereto as the same are now occupied by me," and I think that the latter words limit and qualify the earlier words. Extrinsic evidence can only be applied to see whether there is anything answering this description. The description does exactly apply to the premises which were in his own occupation. Then we are bound

(1) 6 Ch. D. 436. (2) 16 C. B. (N.S.) 698.
(3) Law Rep. 1 Ex. 331.

to say that that property alone passes under the devise. That consideration alone is enough to dispose of the case.

I may add that, so far as Lord *Hatherley's* opinion in *Stanley* v. *Stanley* (1) differs from that of *Erle*, C.J., in *Webber* v. *Stanley* (2), it cannot in my judgment be supported. I think that he erred in attaching too great weight to extrinsic facts. The present case appears to me to come within the first category in *Webber* v. *Stanley* (3): "Where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more, passes." Taking the words of the will in their natural sense there is a property which answers every word of the description, and that being so the argument *ab inconvenienti* has no application. It is only after we have construed the words of the will that we can apply extrinsic evidence to them. I think that Mr. *Farwell* successfully distinguished *Travers* v. *Blundell* (4) on the ground that the meaning of the will was to give all that property which the testator's father had devised by his will and described as that part of *Rigby's* estate purchased by him, which the testator then described as consisting of four fields, which he named. There was no property described by the testator's father as the part of *Rigby's* estate purchased by him which consisted of those four fields. There was, therefore, no subject to which all the testator's words applied, and the Court had to consider what was the substance of the gift, whether the testator meant to give what his father had described as the part of *Rigby's* estate purchased by him, adding an incorrect statement of the particulars of which it consisted, or to give the four fields. In the present case, there is a subject answering all the testator's words.

Solicitors: *J. Cotton & Son*, agents for *Townend, Wakefield; Seal.*

(1) 2 J. & H. 491.
(2) 16 C. B. (N.S.) 698.
(3) 16 C. B. (N.S.) 752.
(4) 6 Ch. D. 436.

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## *In re* BRYANT.
## BRYANT *v.* HICKLEY.

[1893 B. 1008.]

*Infants—Maintenance Clause—Power or Trust—Direction to apply whole or part of Income "for or towards" Maintenance—Discretion of Trustees—Jurisdiction of Court to interfere—Ability of the Mother.*

A testator declared that, from and after the decease or marriage again of his wife (who was tenant for life of the whole estate during widowhood, and also one of the trustees), his trustees should apply the whole, or such part as they should think fit, of the income of the expectant share of any child, for or towards the maintenance, education, or benefit of such child. The wife married again, whereupon her income was reduced to £4000 per annum: the testator's children, who were quite young, continued to reside with their mother, who maintained and educated them as formerly, though she had applied to her co-trustees to make her an allowance of £300 per annum, out of the testator's residuary estate, towards their maintenance. The co-trustees, in the exercise of their discretion, declined to make any such allowance. On an application by the infants for an order on the trustees to pay a reasonable sum for their future maintenance:—

*Held*, that there was no absolute trust to apply the income to the maintenance of the infants, but a discretionary trust, equivalent to a power; and that the co-trustees having, in the *bonâ fide* exercise of their discretion, refused to make any allowance for maintenance, because they did not consider it necessary at present, or for the true benefit of the infants, the Court could not interfere to overrule their discretion, and that the application must therefore be refused.

*Wilson* v. *Turner* (1) and *Tempest* v. *Lord Camoys* (2) discussed and explained.

### ADJOURNED SUMMONS.

This was an application by three infants, aged nine, seven, and six years respectively, by their uncle as their next friend, asking for maintenance out of the income of their father's estate, under the following circumstances:—

*Frederick Carkeet Bryant*, who died in December, 1888, by his will, after appointing his wife *Lilian* and four other persons his trustees and executors, and his wife during her life guardian of his infant children, and making various specific and pecuniary bequests, devised and bequeathed all his real estate and

(1) 22 Ch. D. 521. (2) 21 Ch. D. 571, 576, n.

the residue of his personal estate to his trustees, upon trust to permit his wife to occupy his mansion-house during her life or widowhood, and subject thereto upon trust for sale and conversion, and to pay the income thereof to his wife during her life, or until she should marry again; "and so that during the subsistence of my said wife's interest therein she shall be under the obligation of maintaining and educating in a manner suitable to their station in life," such of the testator's children as being sons should be under the age of twenty-one years, and not engaged or employed in any business or profession yielding them an income sufficient, in the estimation of the trustees, for their maintenance, and as being daughters should not be or have been married. The testator directed that in the event of his wife marrying again his trustees were to pay to her during the rest of her life, out of the income of his residuary estate, the annual sum of £4000 for her separate use, without power of anticipation, in addition to any benefit she might be entitled to under the settlement executed on her marriage with the testator (from which she received about £1000 a year), and, subject as aforesaid, his trustees were to hold his residuary trust estate, both capital and income, for such of his children living at the time of his death, as being sons should attain twenty-five years, or being daughters should attain that age or marry, as tenants in common, the shares of sons being double those of daughters, and the shares of daughters marrying under twenty-one to be settled.

The will contained limitations over in the event of no child living to attain a vested indefeasible interest, and the following maintenance clause: "After the decease or marriage again of my said wife, my trustees shall apply the whole, or such part as they shall think fit, of the income arising from the share in the residuary trust fund, to which any child or other issue of mine shall for the time being be entitled, or contingently entitled, for or towards the maintenance and education, or otherwise for the benefit, of such child or other issue, and whether he or she shall be under or over the age of twenty-one years."

The testator left his widow and three children, the infant Plaintiffs, surviving him.

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The children, who were a girl of nine, a boy of seven, and a girl of six, years of age, lived with their mother, who maintained them.

On the 17th of October, 1891, the widow married again. The children continued to reside with their mother, who maintained and educated them as formerly, though soon after her marriage she applied to her co-trustees to make her an allowance of £300 a year, out of the testator's residuary estate, towards the infants' maintenance and education.

The income derived from the testator's residuary estate, after paying the wife's annuity of £4000 and keeping up the mansion-house, at present produced only between £600 and £700 per annum, and the co-trustees, in the exercise of their discretion, declined to make any such allowance, on the ground that it was not fit and proper, at present and under the existing circumstances, to apply any part of the income of the residuary estate for maintenance, and that to do so would not be for the true benefit of the infants, who were already being well and sufficiently maintained and educated, but for the benefit of the mother and her present husband.

A considerable correspondence passed between the husband and the trustees on the subject of this allowance, the effect of which, as contended by the trustees, and as ultimately held by the Court, was, that the object of getting some allowance for the children was mainly that the mother might thereby be enabled to save out of her income for the benefit of her second husband.

The infants, by their next friend, now applied to the Court to make an order on the trustees to pay a reasonable sum for their future maintenance.

*Farwell*, Q.C., and *Charles Browne*, for the infants:—

The trustees seem to think that because the mother has £5000 a year from her first husband, and has hitherto maintained and educated these infants, and is willing, in any case, to do her duty by them, that therefore an allowance for maintenance is not necessary. We contend that the mother's means have nothing to do with the question: the case of the mother is quite different to that of a father, and an inquiry is never made as to

the mother's ability to support her children out of her own fortune: *Douglas* v. *Andrews* (1); *Lewin* on Trusts (2). It may be a great injustice not to let these children benefit by the trust for maintenance, even though to give them an allowance may have the indirect effect of profiting the stepfather, and maintenance has been granted even where a father had £5000 a year: *Malcomson* v. *Malcomson* (3). The direction in the will as to maintenance is imperative. The trustees have no discretion as to that; their only discretion is as to the amount.

Admitting that there is some discretion in the trustees, which they must all exercise, if they cannot agree, as here, the Court will exercise it in their place. The Court can control the discretion of the trustees: *Tempest* v. *Lord Camoys* (4).

*Wilson* v. *Turner* (5) must be taken in connection with the special circumstances of this case, and does not apply here.

The testator has made express provision for maintenance after the second marriage of his wife, and the fact that the mother has maintained them from October, 1891, is to her credit, and ought not to be used as an argument against allowing her maintenance now she asks for it.

*C. W. Greenwood*, for the mother, supported the application, but took no part in the argument.

*Levett*, Q.C., and *W. F. Hamilton*, for the four trustees:—

The application is not made in the true interests of the infants, but in the interest of the second husband. If any allowance is made, it will only be to enable the mother to save out of her income for the benefit of her husband: that is the key-note of the correspondence. We say that there is no absolute trust to apply anything to the maintenance of the children, but a discretionary trust equivalent to a power: *Wilson* v. *Turner*, where the maintenance clause is in almost the same words. The trustees have honestly exercised their discretion in refusing, at present, to make any allowance, and the Court will not interfere: *Tempest* v. *Lord Camoys* (6). *Tempest*

(1) 12 Beav. 310.
(2) 9th Ed. p. 660.
(3) 17 L. R. Ir. 69, 89.
(4) 21 Ch. D. 576, n.
(5) 22 Ch. D. 521.
(6) 21 Ch. D. 571.

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v. *Lord Camoys* (1) is distinguishable, because the leasing power was part of a general scheme of management. The Court does not usually interfere in these cases where the trustees have really exercised their discretion: *Brophy* v. *Bellamy* (2); *In re Lofthouse* (3). We have exercised our discretion for the benefit of the infants; we have considered all the circumstances, and we do not consider any allowance necessary at present, and the application ought not to be granted.

*Farwell*, in reply:—

The point in *Wilson* v. *Turner* (4) was, that no discretion was exercised. In this case there is a power coupled with a duty meant to be exercised by the trustees, and, as they are not all agreed, the Court will either compel the refusing trustees, or exercise the power in their place. The matter has now passed to the Court, and I ask the Court to exercise its discretion in favour of the Applicants.

CHITTY, J.:—

This is an application by three infants, by their next friend, asking that out of the income of their father's estate the sum of £300 a year may be allowed for their maintenance. The father is dead, their mother is alive, and since the father's death she has married again. She, by statute, is now the guardian of the children, and also, by statute, having separate property, she is subject to all such liability for the maintenance of her children as a husband is by law subject for the maintenance of his children.

The question turns upon a clause in the will which I will read in a moment. There is a contest raised at the Bar with reference to the nature of this clause, and it is urged in support of the application, that when the will is properly read, there is on the face of it a necessary implication that the trust or power, whichever it ought to be called, must be exercised, and exercised, if the argument meant anything, for the benefit of the mother.

(1) 21 Ch. D. 576, n.
(2) Law Rep. 8 Ch. 798.
(3) 29 Ch. D. 921.
(4) 22 Ch. D. 521.

[His Lordship then stated the will shortly, and, having read the maintenance clause, continued:—]

I am unable to find in that will any such necessary implication as is contended for. The lady now is, so far as the will goes, under no obligation to maintain the children. She is freed from that, and the rest is left to the law, which I stated at the commencement of this judgment. It is quite plain from the form of the clause which I have just read that the testator did not mean to create a trust for the benefit of his widow. I think it is not necessary to say more upon that part of the case.

Now the income of the testator's estate appears to have been less than that which it was hoped it would amount to. There is a surplus income of £600 a year, or thereabouts, applicable under the clause. The trustees are five in number, the widow herself being one. She supports the application; but the other four trustees, against whom not one word can be said, oppose it, and they take up this ground: they say that they have considered the circumstances, and that in the exercise of an honest discretion they have come to the conclusion that it is not fit and proper that they should apply the income or any part of it at present, and in the existing circumstances, for the maintenance of the children.

As against this position, it is argued in support of the application, that there is manifested in the clause a trust which must be executed, and, admitting that there is some discretion vested in the trustees, it is said that this is a discretion which they must all exercise, and that if they do not agree, as is the case, in exercising it, the Court must exercise it in their place.

Now, a similar clause came before the Court of Appeal in *Wilson* v. *Turner* (1). No substantial difference is to be found in the language of the clause in *Wilson* v. *Turner* and that which I have just read. The point in that case was with reference to the liability of a father to account for income which he had received from trustees, the father having unduly obtained from the son a gift of the *corpus* of the property which was set aside; and the father had to account for what had been thus received, and the question was, whether he was to account also for the income.

(1) 22 Ch. D. 521.

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The trustees, without exercising any discretion in the matter whatever, had paid over the whole of the income to the father, and the Court of Appeal, affirming the Vice-Chancellor's decision, held that the father must account for the income. The exact point of the case was, that the trustees had not exercised their discretion, and, consequently, that it was a wrongful payment on their part, and that the father, being privy to it and having received the money, was bound to account. But the Master of the Rolls dealt with the clause critically, and expressed his opinion that the trustees were not bound to apply any part of the income for the maintenance of the son. Lord Justice *Lindley* examined the clause also with care, and he said (1): "It runs in this way, reading it shortly, it declared that the trustees should (so far it looks like a trust) after the decease of the wife apply the whole or such part as they should think fit of the annual income for or towards the maintenance of the children. Let us see how, under those words, apart from authority, it could be said, consistently with the language, that it was the duty of the trustees to apply any part of this fund to maintain the children. I think it would be doing violence to the language to say that this was a trust obliging the trustees so to apply the fund; and if it were not for authority I should be content to stop there and say I cannot so read this clause." Then he examined the authorities, and came to the conclusion that I have already stated.

Now, I do not understand that the Court of Appeal in *Wilson* v. *Turner* (2) intended to overrule the decision of the Court of Appeal, to which the same Master of the Rolls was a party, in the case of *Tempest* v. *Lord Camoys* (3), which was decided a few months before. That decision has a bearing upon the case which I now have to decide. There, the Court held that the case was one of mixed trust and power, and that there was an obligation on the part of the trustees to lay out the funds in their hands in the purchase of real estate, but that the trustees had a discretion in regard to the time, the manner, and the circumstances in which they would execute this trust. The short facts were, that one of the trustees proposed to buy a particular

(1) 22 Ch. D. 527. (2) 22 Ch. D. 521. (3) 21 Ch. D. 571.

estate, and insisted upon it; the other trustee, as I held, in the exercise of an honest opinion, said that he did not think it was proper to buy that particular land. Here, the trustees were differing in opinion as to the exercise of their discretion. I held, and the Court of Appeal affirmed what I did, that the Court would not control the exercise of the discretion by the trustee who refused to buy the land, and, consequently, that the order that was asked for could not be made. The trustee there, who dissented, did not take up the position, "I will not look into this matter at all; I will not lay out the money in the purchase of land"; but he said, "Willing as I am to execute the trust, I say that this particular purchase is not a fit and proper one." That being honestly done, the Court declined to interfere with his discretion. The other case of *Tempest* v. *Lord Camoys* (1) was an early one before Lord *Cairns*, where there was a power given to the trustees in their absolute discretion to execute a lease. It was a power in terms; but Lord *Cairns*, on reading the whole will, came to the conclusion that it was a power vested in them for the purpose of giving effect to the general scheme that was found in the will; and, consequently, it was obligatory on them to execute the lease. That would seem merely in point of language to be a pure power and discretion.

Now, I think that in *Wilson* v. *Turner* (2) the Court of Appeal did not mean to lay down the proposition that in regard to such a clause as I have before me there was not a duty to be performed by the trustees; they had not to consider the case of the trustees saying, "We will have nothing to do with the maintenance of the children, and we will not take into consideration the circumstances of the case." Therefore, the observations that fell from the Judges of Appeal must be taken to be addressed to the particular point that they had before them; and, as I have said, it was a case in which the trustees had exercised no discretion whatever. If, however, I were to take the language literally, the result would be that I must decide this case in favour of the four trustees. If, however, on the other hand, the correct view is, that there is an obligation to entertain the question of duty to consider the matter, and then a discretion arising in the execution

(1) 21 Ch. D. 576, n. (2) 22 Ch. D. 521.

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of the duty, then I may inquire whether the four trustees are acting honestly or not, in the discharge of their duty, and I may say here at once that I do not see the slightest ground for imputing anything like a breach of duty to the four trustees. The four trustees take up this position: "We have looked into this matter: we find that the surplus income is £600 a year only; we see that the children are being well educated and maintained by their mother, who has not only the £4000 a year from the father's estate under his will, but has an additional income of nearly £1000 a year derived from the settlement that he made on her on his marriage; we find that the mother is not only able, but that she is willing to maintain, and is maintaining, these children and educating them according to their station and rank in life; we see that hereafter, when the children grow older, and the boy has to go possibly to a public school, or to a university, that money will be required to assist him in his career; we see that the children also take no vested interest, and take nothing under the will except through the medium of this power until, as to the boy, he attains twenty-five, and as to the girls until they attain that age or marry; and it may be, in the course of events, when they attain the age of twenty-one, they may want money for purposes for which it is not wanted as they now are; and we think it is for the benefit of these young persons that we should have in hand the fund available for their maintenance and education as they grow older, and available also for their maintenance, if not for their education, when they have passed their infancy—when they have arrived at the age of twenty-one years." The trustees have no ill-feeling towards the lady nor towards her husband as far as anything is disclosed on the evidence; they have taken all the circumstances into consideration, and they say further: "It is our duty in executing this trust or power, whatever the Court chooses to call it, to have regard to the interests of the children, and we think this application is not made in their interests, but in the interests of another, and, to put it quite plainly, in the interests of the stepfather."

[His Lordship having referred to the correspondence, and stated at length one of the husband's letters, continued:—]

This letter does justify the trustees in saying that the object of the application is to put by money—that, in other words, the wife might be enabled to save for the benefit of the husband. It is not, of course, improper that she should save it, if she thinks fit, for her husband; but this shews that the money is not really wanted for the maintenance and the education of the children.

I come to the conclusion that the four trustees have acted honestly and prudently in the exercise of their discretion, and I think I am not in a position, as a matter of law, to overrule their discretion. Mr. *Farwell*, in his ingenious reply, tried to sever the different points, and to make out that, somehow or other, there being a discretionary power which had not been exercised (it is a curious argument), the Court would exercise it in the place of the trustees. Mr. *Farwell* may like a further opinion on this or may not—I cannot say; but I think it is at least right that I should express my opinion that, supposing that argument to be well founded, and that the discretion has now passed to the Court, and that it is exerciseable by the Judge sitting here, I do exercise the discretion, but adversely to the application. I think I need say no more about the case except that the application fails.

Solicitors: *Clowes, Hickley, & Steward; Wilson, Bristows, & Carpmael.*

W. C. D.

CHITTY, J.

1893
Dec. 13.

## *In re* LORD SUDELEY AND BAINES & CO.

*Will—Settlement—Tenant for Life—Limitations over—Power of Sale—Discretion—Duration—Intention of Testator or Settlor—Remoteness.*

Where in a deed or will there is a limitation of real and personal estate to one for life, and upon the death of the tenant for life upon trust to divide amongst certain persons, with power or authority to the trustees to sell, at such times as they shall think fit, all or any portion of such real and personal estate, such power of sale is not void as infringing the law against perpetuities, but may be exercised within a reasonable time after the death of the tenant for life, and after the property has become absolutely vested in possession, if on the construction of the particular instrument it appears to be the intention of the settlor or testator that it should be then exercised.

*Dictum* of *Jessel*, M.R., in *Peters* v. *Lewes and East Grinstead Railway Company* (1), approved of and followed.

THE Hon. *Algernon Gray Tollemache*, by his will dated the 31st of January, 1874, among other devises and bequests gave and devised his six freehold houses, Nos. 194, 195, 196, 197, 198, and 226, in the *Strand*, to his wife, *Frances Louisa Tollemache*, for life or widowhood, and after her death or second marriage the testator directed that the said freehold houses should fall into his residuary real estate thereinafter disposed of. And the testator gave, devised, and bequeathed all the rest and residue of his real and personal estate in *England*, *Ireland*, the colony of *New Zealand*, or elsewhere, to his brother, *Frederick James Tollemache*, his niece, *Olivia Sinclair*, and Lord *Sudeley*, and the survivor of them, upon trust to pay the rents, dividends, and interest thereof to his said brother, *Frederick James Tollemache*, during his life, and after his death to pay the same to his said wife and his two sisters, Lady *Catherine Tollemache* and Lady *Laura Grattan*, and to the survivors and survivor of them during their joint lives and the lives and life of the survivors and survivor of them; so that, during the joint lives of his said wife and two sisters, or of any two of them, as the case might be, the rents, dividends, and interest of his said residuary estate might be equally divided between them, share and share alike; and so

(1) 18 Ch. D. 429.

that, after the death of any two of them, the survivor should receive the whole of the said rents, dividends, and interests for the remainder of her life. And from and after the deaths of his said wife and his said two sisters, the testator gave, devised, and bequeathed his said residuary real and personal estate in the following manner: He gave, devised, and bequeathed one-half of the same to his before-named brother, *Frederick James Tollemache,* and to his heirs, executors, administrators, and assigns; and in case his said brother, the said *Frederick James Tollemache,* should die in his lifetime, the testator directed that the devise and bequest of the said half so made in favour of his said brother should not lapse and fail of taking effect, but should go and be taken as part of his real and personal estate, and so pass under his will or to his estate in the same manner, as far as circumstances would allow, as if he had survived the testator. And in case of the last-named devise and bequest of such half, in the event of his said brother's death in his lifetime, not being according to law and therefore void, the testator gave, devised, and bequeathed the said half of his said residuary real and personal estate to his said brother *Frederick's* only child, *Ada Hanbury Tracy,* the wife of the said Lord *Sudeley,* for her life, and at her death, or in case she should have died before him (the testator), he directed that it should be divided equally, share and share alike, between any children she might have who should live to attain the age of twenty-one years, or being a daughter should marry under that age, excepting, however, an eldest son, who should have become Baron *Sudeley* or heir-apparent to that peerage; and as to the other and remaining half of the said residuary real and personal estate, dividing the said half in two equal shares, the testator gave, devised, and bequeathed one such share to his brother, *Hugh Francis Tollemache,* and to his heirs, executors, administrators, and assigns; and in case his said brother, *Hugh Francis Tollemache,* should die in his lifetime, by which event the said devise and bequest to him would lapse, the testator then gave, devised, and bequeathed the said share so given to his said brother equally, share and share alike, to all the children of his said brother *Hugh,* excepting his eldest son, *Ralph Lionel,* who the testator declared should, under no circumstances,

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take any benefit under that his will. And as to the other and remaining shares of the above-named half of his said residuary real and personal estate, the testator gave, devised, and bequeathed the same equally to be divided, share and share alike, between his before-named niece, *Olivia Sinclair*, the five children of his late brother *Arthur*, such of the five children of his late niece *Louisa Mason*, such of the three children of his late niece *Emelia Power*, and such of the three children of his late niece *Adelaide Hope Johnstone*, as should live to attain twenty-one years, or being a daughter should marry under that age; and the testator directed that, if any of the said persons should die in his lifetime leaving a child or children, that then such child or children, on attaining the age of twenty-one years, should be entitled to the portion of the said share which would have come to their parent if such parent had acquired a vested interest previous to their death. And the testator declared, that the several persons who should eventually be entitled under his will to the absolute reversion of his said residuary estate should take and hold the same as tenants in common, and not as joint tenants. And the said testator authorized the trustees of his will to sell, either by public auction or private contract, at such times, for such prices, and on such terms and conditions as they should think fit, all or any portion of his said residuary real estate, and for that purpose he directed them to convey the same by deed to any purchaser or purchasers thereof; and he declared that the receipts of his said trustees for any money paid to them in that character should be a sufficient discharge to any purchaser or purchasers thereof, and should entirely exonerate the person or persons paying the same from all liability in respect to the application thereof; and he appointed the said *Frederick James Tollemache*, *Olivia Sinclair*, and Lord *Sudeley* executors of his will.

By a codicil dated the 2nd of May, 1879, the testator revoked the devise to his wife of the six freehold houses in the *Strand*, and by another codicil, dated the 29th of November, 1889, the testator appointed the said Lord *Sudeley* and *Julius Alfred Bertram* executors and trustees of his said will.

The testator died on the 16th of January, 1892, and his will

with six codicils was proved by Lord *Sudeley* and *Julius Alfred Bertram* on the 12th of February, 1892.

Lady *Catherine Tollemache* died on the 9th of January, 1878, and Lady *Laura Grattan* died on the 12th of July, 1888. *Frederick James Tollemache* also died in the testator's lifetime.

*Frances Louisa Tollemache*, the testator's wife, died on the 15th of April, 1893.

On the 20th of July, 1893, the testator's real estate in the *Strand* was put up for sale by auction, when *H. R. Baines & Co.* became the purchasers of Nos. 194, 195, and 196, *Strand*, being lots 2, 3, and 4 at such sale, and the *Illustrated London News Company* became the purchasers of Nos. 197 and 198, *Strand*, being lot 1 at such sale.

The purchasers in their requisitions on the title having raised the question whether the power of sale had not expired by reason of the estate having become absolutely vested in the beneficiaries in fee simple, summonses were taken out by the above purchasers for a declaration that the vendors, as executors and trustees, had no subsisting power to sell the hereditaments, and that a good title thereto had not been shewn in accordance with the particulars and conditions of sale.

These summonses were both adjourned into Court.

*Farwell*, Q.C., *Whiteway*, and *F. L. Wright*, in support of the summonses:—

As all the tenants for life under the will are dead and the *cestuis que trust* have obtained an absolute vested interest in possession, the power of sale is not now exerciseable. As long as the trusts continue, the power is valid for all purposes; but so soon as the fee vests in possession, the power is determined and the object of the settlement at an end: *Lantsbery* v. *Collier* (1). This is not a power of sale "for the purposes of division," as in *Peters* v. *Lewes and East Grinstead Railway Company* (2). Although in that case, *Jessel*, M.R., was of opinion that the power of sale given to the trustees did not determine on the death of the tenant for life, but might have been exercised within a reasonable time afterwards, for the purposes of dividing the

(1) 2 K. & J. 709. (2) 18 Ch. D. 429.

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property, that was only a *dictum*, and neither of the Lords Justices expressed any opinion on the point.

There is nothing to justify the Court in examining the will, in order to find out the intention of the testator, as in *In re Cotton's Trustees and the School Board for London* (1).

[They also referred to *Mower* v. *Orr* (2), and *Cornick* v. *Pearce* (3).]

*Byrne*, Q.C., and *Sefton Strickland*, for the vendors:—

The power of sale is still in existence, and we can make a good title under it.

In *In re Tweedie and Miles* (4), it was held that the trust for sale was not spent, but was exerciseable by the trustees after the deaths of the tenants for life on whose request the sale was to be made, and that the consent of the beneficiaries was not necessary.

We rely on *Peters* v. *Lewes and East Grinstead Railway Company* (5).

*Farwell*, in reply.

CHITTY, J.:—

The purchasers object to the title on the ground that the power of sale contained in the testator's will was not subsisting at the time of the sale. The testator died in January, 1892, and the sale took place in July of this year. The power of sale runs thus. [His Lordship read the clause, and proceeded:—]

In regard to a point raised for the purchasers, I am of opinion that those words directing the trustees to convey the real estate sold to any purchasers are sufficient to shew the testator intended that the legal estate in fee simple should pass to his trustees. The trustees, according to the power, are to sell at such time as they shall think fit. There is no other limitation of the period within which they may exercise the power. Now, in regard to powers of sale in settlements, whether by deed or by

(1) 19 Ch. D. 624.
(2) 7 Hare, 473.
(3) 7 Hare, 477.
(4) 27 Ch. D. 315.
(5) 18 Ch. D. 429.

will, where there is no limit of time—as sometimes, but rarely, is the case—to shew that the power must be exercised within lives in being and twenty-one years afterwards—that is, within the period allowed by the law against perpetuities—*Lantsbery* v. *Collier* (1) and other authorities appear to have settled the law in this way. These unlimited powers can be exercised only while the purposes of the settlement remain unexhausted. A familiar illustration is afforded by an ordinary strict settlement by deed, where the legal estate is taken by tenants for life in succession with limitations in tail, and in such cases the unlimited power of sale is supported on the ground that the tenant in tail in possession can bar the power. In other cases where the settlement is not of the strict nature the rule which I have mentioned has been applied, and the function of the Court is to look through the instrument to see whether the purposes are or are not exhausted; and the general rule is that where, to use a familiar expression, the estate is "at home" where it is vested absolutely in some person or persons in fee simple, that power is no longer exerciseable as against the estate and interest which those persons thus take. It is a question of intention, and on looking through the instrument the Court has to come to the conclusion whether or not it was the intention that the power should be exercised after the estate in fee simple was thus vested in possession. There came before the Court of Appeal in *Peters* v. *Lewes and East Grinstead Railway Company* (2) a question in regard to a power of sale contained in a will. The trustees there took the legal estate in trust for the testator's wife for her life, and after her death to assure it to three persons in equal shares for their separate use, as tenants in common, with a gift over in favour of their respective issue, in an event which did not happen, and the power of sale was conferred in express terms "for the purpose of division." The Master of the Rolls (Sir *George Jessel*) expressed his opinion that that power of sale did not determine on the death of the tenant for life, but was exerciseable within a reasonable time afterwards for the purpose of division. He said (3): "As it has long been the habit of

(1) 2 K. & J. 709. (2) 18 Ch. D. 429.
(3) 18 Ch. D. 433.

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conveyancers to frame powers of sale in general terms, the Courts have had to consider how they are to be limited so as to bring them within the rule; and the Courts have decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement, whether made by will or deed, the absolute interests come into existence"—by which I understand him to mean fall into possession—"then the power is considered to be at an end; and, inasmuch as no settlement can be valid either by will or deed under which absolute limitations do not come into existence within the prescribed period, that makes all the powers valid. That is the doctrine which is laid down not only in *Lantsbery* v. *Collier* (1), but in a long line of cases. But that does not appear to me to have any application to a case where the power is to take effect on the coming into existence of the absolute limitations; or, to put it in other words, it does not apply to a power where there is nothing but absolute limitations of interests given in the first instance. Suppose, for instance, a man having a dozen children gives his real and personal estate to trustees upon trust to divide amongst his twelve children, and, for the purpose of making the division, he empowers the trustees to sell. That is not, in my opinion, an invalid power. The trustees are bound to make a division, within a reasonable time. . . . . and no one would say that twenty-one years was a reasonable time." He agrees that in such a case as that, "if all the children, being free from disability, concur in calling upon the trustees to convey, that puts an end to the trust, and, of course, to the power also"; but where the children in the supposed case do not so concur, he considers the power is still exerciseable, and upon the construction of the instrument within a reasonable time—a reasonable time being in such a case a time well within that which is allowed by the law against perpetuities. Now, he makes a pertinent observation on the will before the Court, where the power, as I have said, was "for the purpose of division," that "it is more convenient to make a division by selling the property and dividing the money than by allotting undivided

(1) 2 K. & J. 709.

shares"—a remark which is, of course, peculiarly applicable to real estate, and to real estate which, according to the limitations, has to be divided among numerous persons. There the only mode of obtaining a sale would be through the medium of the Partition Acts. Now, it is true that the other members of the Court refrained altogether from expressing any opinion on this point, and consequently it is rightly said by the purchasers that this was the opinion of the Master of the Rolls alone; and having regard to the decision of the Court, they are justified in saying that this was not more than a *dictum* on his part. But I see no reason to think that the opinion thus expressed by the Master of the Rolls is incorrect, or that it was not in accordance with the previous authorities bearing upon the point.

In *In re Cotton's Trustees and the School Board for London* (1), Sir *Edward Fry* had before him the question of a power of sale conferred on trustees, limited, however, as to its exercise by express terms to the period allowed by the rule against perpetuities; and the question he had to decide was whether this power to which no objection could be raised of a general kind was still exerciseable, although the property had become vested absolutely in persons who were *sui juris*. He treated that question as one of the intention of the settlor whether the power remained exerciseable after that event of vesting in possession, and he examined the limitations and the terms of the will for the purpose of seeing whether that intention was sufficiently manifested. Now, it is observable that in the power he had before him, there was no mention of its exercise for the purpose of division; but he collected from the rest of the instrument that there was such an intention, and manifested in such a manner that he was justified in saying that the power was intended to be exercised for the purpose of division. The result, then, of these two authorities, and particularly the last, is that on the question before me I have to examine the other parts of the instrument for the purpose of ascertaining whether the intention is sufficiently shewn that the power should be exercised after the death of the tenants for life for the purposes of a division. It appears by way of admission,

(1) 19 Ch. D. 624.

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I think, that the persons beneficially entitled, in the events which have happened, to the testator's residuary real estate are some twenty or so in number, and that, with regard to one-fourth, the division, whether it is to be notional division or actual division, is a division among sixteen persons in seventeen shares, one taking two shares and bringing the fractions in regard to that one-fourth to a sixty-eighth part of the whole. Now, I will shortly examine the will with the view already stated. [His Lordship went carefully through the clauses of the will, and proceeded:—]

The result is that there is contemplated by the testator on the face of his will a distribution of property among numerous persons, and, as I have said, a distribution which, at the present time, in the events which have happened, is among no less than twenty persons or thereabouts, and in the shares and fractions which I have stated. Then comes the power of sale—a power in terms to be exercised at such time as the trustees think fit.

It appears to me that I am justified in holding that on the true construction of this will the testator intended that this power should subsist for the purpose of making the more convenient distribution among the objects of his bounty. The power, therefore, is not obnoxious to the rule against perpetuities. It is a power that must be exercised within a reasonable time after the life estates have come to an end. I think the power, as was admitted in the argument for the purchasers, was one that could have been exercised during the life of the longest liver of the tenants for life; and I think that it did not determine upon the happening of that event, but that there was a reasonable time, as the Master of the Rolls said in the case to which I have referred, after the life estates dropped allowed and intended by the testator for the exercise of this power. There is no question such as there was in the case of *In re Tweedie and Miles* (1), before Mr. Justice *Pearson*, where there was a trust for sale and not a mere power; and there is no question that the power has been exercised within a reasonable time. I can find no argument of any weight adverse to the conclusion at which I

(1) 27 Ch. D. 315.

have arrived in any of the cases. The result, therefore, is that I think the power was and is subsisting.

Solicitors: *L. Basil Thomas; Maddisons; J. A. Bertram.*

G. M.

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## PIDDOCKE *v.* BURT.



[1893 P. 1381.]

*Attachment—Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 3—*Partner —Fiduciary Capacity.*

One partner receiving assets of the partnership on account of himself and his co-partners, is not liable to imprisonment under sect. 4, sub-sect. 3, of the *Debtors Act,* 1869, as a person acting in a fiduciary capacity.

# MOTION.

This was an application for a writ of attachment for making default in payment of a sum of money, which raised the question, whether one partner receiving money on account of himself and his co-partner, received it in a fiduciary capacity, so as to be within the exception contained in sub-sect. 3 of sect. 4 of the *Debtors Act,* 1869.

The facts, so far as material for the purposes of this report, were as follows:—

The Plaintiff and Defendant had been in partnership as solicitors; the action was one for a dissolution of partnership, in which, by an order of the 21st of June, 1893, a receiver had been appointed by consent, upon the application of the Plaintiff, to receive, collect, and get in the outstanding debts and other moneys owing, belonging, payable, or which might be paid, to the firm of *Piddocke & Burt,* solicitors.

On the 10th of July, 1893, the Defendant applied for, and on the 23rd of August obtained, a four-day order against the Plaintiff for payment by him, to the receiver, of £479 2*s.* 6*d.* in his hands belonging to the outstanding partnership estate, or to the clients of the partnership business. After some delay this order was duly served on the Plaintiff, but as he failed to comply with it, the Defendant now moved that a writ of

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attachment might issue against the Plaintiff for his contempt in not obeying the order of the 23rd of August.

The larger part of the sum of £479 2*s.* 6*d.* consisted of rents and other moneys belonging to clients of the firm, and admittedly received by the Plaintiff in a fiduciary capacity, and the remainder consisted of money received by him on account of costs owing to the partnership business.

*Church*, for the motion :—

The bulk of this money has admittedly been received by the Plaintiff in a fiduciary capacity; so that I only have to shew, that what was alleged to have been received on account of the partnership business was also received in a like capacity to be entitled to an attachment, and *Middleton* v. *Chichester* (1) will not apply, because the whole sum will then have been received in a fiduciary capacity. The sums received by Plaintiff on account of costs were received by him in a fiduciary capacity, just as much as money received by a *London* agent for a country solicitor: *Litchfield* v. *Jones* (2); or by an auctioneer: *Crowther* v. *Elgood* (3); or a defaulting receiver: *In re Gent* (4). The Plaintiff can be called upon to account to us for what he has thus received, and can be called upon to pay us our share, and therefore stands in a fiduciary relation towards us: *Marris* v. *Ingram* (5); and leave ought therefore to be given to issue a writ of attachment for non-payment.

[CHITTY, J.:—Do you contend that if this Plaintiff had overdrawn his account, he would be in a fiduciary capacity to the extent of such overdraft?]

No. That is quite different from the present case of receiving money on account of the partnership, and not accounting for it, or paying it to the receiver as directed.

*W. Baker*, for the Plaintiff:—

The present is an entirely different case from those cited and relied on in support of this application; there is no reported case

(1) Law Rep. 6 Ch. 152.
(2) 36 Ch. D. 530.
(3) 34 Ch. D. 691.
(4) 40 Ch. D. 190.
(5) 13 Ch. D. 338.

in which one partner, in a similar position to the Plaintiff, has been attached for non-payment of money, at the instance of his co-partner. We have a legal right to receive any of the assets and moneys of the partnership. We may be liable to account for them, but there is no fiduciary relationship between one partner and his co-partners within the meaning of the *Debtors Act*, s. 4, sub-s. 3: *Knox* v. *Gye* (1). The amount received for costs, therefore, does not come within the exception of the statute, and the Defendant fails to shew anything to take the case out of the operation of the 4th section: *Middleton* v. *Chichester* (2); and his application should be refused.

*Church*, in reply.

CHITTY, J.:—

The *Debtors Act*, 1869, has now been in operation a long time—nearly a quarter of a century—and during all this time no application has ever been made, so far as I know, by one partner for a writ of attachment against another partner who has received money on account of the partnership business, which he has failed to pay over to some third person, or into Court, under an order for payment. That in itself is a somewhat striking fact in opposition to the present motion, because, during all these years, there must have been many such cases as to the receipt of partnership moneys.

The bare question I have to decide is, whether one partner who receives money belonging to the partnership on account of himself and his co-partner—I am stating the case strictly—receives it in a fiduciary capacity.

Counsel for the Applicant has argued that the money was received in a fiduciary capacity; but none of the cases he has cited and relied on establish this proposition. Mr. Justice *Kay* and the Court of Appeal have decided, in *Crowther* v. *Elgood* (3), that an auctioneer is in a fiduciary capacity with respect to the money produced by the sale of goods entrusted to him; but the case of an auctioneer is quite different from that of a partner: an

(1) Law Rep. 5 H. L. 656. (2) Law Rep. 6 Ch. 152.
(3) 34 Ch. D. 691.

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auctioneer receives the purchase-money paid for the goods in the same capacity towards the vendor, whose agent he is for their sale, as that in which he received the goods, and that capacity is fiduciary. Mr. *Church* says, that one partner receiving partnership moneys is the agent of the other partners; but that will not carry him far enough, because it is not every agent who is fiduciary; therefore the analogy he seeks to establish between the present case, and that of an auctioneer receiving purchase-money and making default when ordered to pay it to a receiver or into Court, fails.

In *Marris* v. *Ingram* (1) the defendant was clearly a person acting in a fiduciary capacity as well as liable to account, and in each of the cases relied on by Mr. *Church* the money was not the money of the agent receiving it, but of some other person.

The case of a partner is quite different from these cases, because he receives money belonging to the firm on behalf of himself and his co-partners, and it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership—that is, on behalf of himself and his co-partners—received it in a fiduciary capacity towards the other partners. The law allows one partner—one of several joint creditors—to receive the whole debt on account of the firm to whom it is due, and I am unable to recognise any such distinction, as was endeavoured to be made by Mr. *Church*, between the case of a partner receiving money of the firm and not accounting for it, and that of a partner overdrawing the partnership account; because if this distinction were true, it would apply to every case where one partner wrongly overdraws the partnership account.

The result therefore is, that I must refuse this application; but under the circumstances I decline to give the Respondent any costs.

Solicitors: *Prior, Church, & Adams; Edmonds & Edmonds.*

(1) 13 Ch. D. 338.

W. C. D.

## J. & P. COATS *v.* CHADWICK.

CHITTY, J.

1894

*Jan.* 25, 27.

[1893 J. 2073.]

*Circular—Libel—Merits of Action—Contempt of Court—Injunction restraining issue of Circular—Interlocutory Motion.*

Pending an action for infringing a trade-mark the Plaintiffs are at liberty to warn the trade by circular; but to introduce discussion of the merits of the action is a contempt.

# MOTION.

On the 28th of December, 1893, the Plaintiffs, who were manufacturers of sewing-cotton, carrying on a large and extensive trade, commenced an action against the Defendants, who were also manufacturers of sewing-cotton in a large way of business, for an injunction to restrain them from infringing the Plaintiffs' registered trade-mark, No. 4618, and for an injunction to restrain them from representing by means of wrappers, labels, tickets, or otherwise, that the goods made and sold or offered for sale by the Defendants were the goods of the Plaintiffs, and for damages or an account.

On the same day that the Plaintiffs issued their writ, they sent out to the retail dealers in the sewing-cotton trade and to others a circular, of which the following is a copy:—

"Dear Sir,—We regret to have to draw your attention to the fact that Messrs. *James Chadwick & Brother* (*Limited*) have recently attempted to injure our trade by adopting a blue label for 400 yards six cord which so closely resembles ours as to produce the result of their goods being passed off as ours, nor can there be any doubt that this is intended, as Messrs. *Chadwick* have previously and for a number of years sold their 400 yards six cord with a label of their own which in no way resembles ours.

"Being apparently unsuccessful in selling this class of goods with their own label, they have now adopted the device of imitating ours in order more readily to find purchasers for their thread.

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"We are determined to use every means in our power to put a stop to unfair competition of this sort, and have therefore commenced proceedings against Messrs. *Chadwick*. We have also been compelled to take proceedings against retail dealers selling goods manufactured by Messrs. *Chadwick* and bearing the blue label which is an imitation of ours.

"We think it right to warn the trade in general of the course we are pursuing, and, for your information, we beg to give you at foot an extract from a recent judgment given in the Chancery Division of the High Court of Justice.

"Yours truly,
"*J. & P. Coats (Ltd.)*."

"(*Extract from Judgment.*)

"'All I can say, in conclusion, as to these labels is this, that, though the Defendant may, if he pleases, use such labels or wrappers as are to his liking, he must take very good care that in doing it he does not adopt any which may have the effect or be calculated to produce the result of passing off his goods as those of the Plaintiff.'"

The Defendants now moved for an injunction to restrain the Plaintiffs from issuing the above circular, and from issuing any other circular intended or calculated to prejudice or impede the fair trial of the action, or in the alternative that a writ of sequestration might be issued against the property of the Plaintiff for contempt of Court in issuing the circular.

Sir *R. Webster*, Q.C., *Bousfield*, Q.C., *John Cutler*, and *Sebastian*, in support of the motion.

Sir *E. Clarke*, Q.C., *Moulton*, Q.C., *Bramwell Davis*, and *Reginald Winslow* for the Plaintiffs.

The following cases were referred to: *In re Cheltenham and Swansea Railway Carriage and Wagon Company* (1); *Roach* v. *Hall* (2); *Kitcat* v. *Sharp* (3); *Goulard* v. *Lindsay* (4).

(1) Law Rep. 8 Eq. 580.
(2) 2 Atk. 469.
(3) 31 W. R. 227.
(4) 4 Rep. Pat. Cas. 189.

CHITTY, J.:—



The Defendants' motion is founded on an alleged contempt. It asks for an injunction to restrain the Plaintiffs from issuing the circular of the 28th of December, 1893, and from issuing any other circular intended or calculated to prejudice or impede the fair trial of the action, or in the alternative for a sequestration against the Plaintiffs. It is competent for the Court, where a contempt is threatened or has been committed, to take the more lenient course of granting an injunction in preference to making an order for committal or sequestration: *Plimpton* v. *Spiller* (1). The circular complained of is dated the same day as the writ in the action, and is signed by the Plaintiffs. It runs thus. [His Lordship read the circular, and proceeded:—]

This circular has been widely distributed by the Plaintiffs among retail dealers in the sewing-cotton trade and others. The special ground of complaint is that the class of persons to whom the circular is addressed is the very class to whom the Defendants will have to look for evidence in support of their defence, and that it is calculated to create a bias against the Defendants in the minds of those who receive it, and to deter them from coming forward as witnesses for the Defendants. It appears to me that it is calculated to prejudice the Defendants in their defence, and that it thus falls under the well-established head of contempt, by interfering with the course of justice. It is a strong, one-sided statement by one of the parties to the action on the merits of the case which is pending before the Court. It unhesitatingly imputes fraud and dishonesty to the Defendants. It charges them, not merely with imitating the Plaintiffs' goods, but with the deliberate intention of imitating. The fact that Messrs. *Coats* hold a high position in the trade, being, as their counsel stated, at the very head of the trade, gives additional force to these statements, and renders it the more probable that the traders, and particularly the smaller retail traders, will be thereby affected adversely to the Defendants. The Plaintiffs' counsel not only admitted, but boldly asserted, and made it part of their argument, that the circular was libellous, and that they could justify the libel, and they referred to some of the evidence

(1) 4 Ch. D. 286.

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which apparently had been adduced for the purpose of sustaining the justification. But the evidence and the argument founded on it are irrelevant on this motion. Interference with the course of justice by the publication of *ex parte* statements by a party to an action is not the less a contempt of Court because the statements are libellous, or because the party is prepared to justify the libel, or because the libel deals with the merits of the action. The considerations applicable to the granting or refusing an injunction on interlocutory motion in a libel action have no application in the present case. On such a motion as the present, the Court declines to go into the merits of the action. The circumstance that the moving parties press for the less severe remedy by injunction rather than the more stringent remedy by committal or sequestration makes no difference.

I grant the injunction as asked, with costs, adding that I should not have intervened if the circular had amounted to a mere warning to the trade against infringement or imitation. The Plaintiffs are at liberty to warn the trade as much as they like, notwithstanding the pendency of this action; but they are bound to refrain during its pendency from public discussion on the merits or demerits of the case.

Solicitors: *Busk & Mellor*, agents for *Cunliffes & Greg, Manchester; Linklater & Co.*

G. M.

## PARTRIDGE *v.* PARTRIDGE.

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Dec. 2, 5.

[1893 P. 2965.]

*Settlement of Real Estate—Conditions subsequent requiring Residence in Mansion-house—Gift over on "Refusal or Neglect" to Reside—Infant.*

A testatrix devised real estate, including a mansion-house, in strict settlement, and added a proviso directing that every person who, by virtue of the limitations thereinbefore contained, should become entitled to the possession or to the receipt of the rents of the estate should, within three months next after the death of the first tenant for life, reside in and occupy the mansion-house for nine months at the least in every year. And in case any person who should come into possession or receipt of the rents of the estate should "refuse or neglect" to reside in and occupy the mansion-house, then the limitation thereinbefore contained of the estate to the use of him or her so refusing or neglecting should cease, and the testatrix gave the estate to the person or persons next in remainder under the limitations in her will:—

*Held*, that inasmuch as an infant has no power to choose his own place of residence, an infant who had become entitled under the will to the possession of the estate could not, if he did not reside in the mansion-house, be said to "refuse or neglect" to do so, and consequently that he was not bound by the condition, and the gift over could not take effect.

SPECIAL CASE stated for the opinion of the Court under Order XXXIV., rule 1.

*Harriet Penyston*, spinster, was, at the date of her will, and thenceforth down to her death, seised in fee simple in possession of an undivided third share of and in a mansion-house and other hereditaments, situate at *Cornwell*, in *Oxfordshire*, and also of other real estate.

By her will, dated the 13th of September, 1831, *Harriet Penyston* devised all and singular the real estate of or to which she should be seised or entitled at the time of her decease unto her two sisters, *Frances Penyston* and *Jane Penyston*, during the term of their joint lives and the life of the survivor of them (subject to and charged with the payment of certain annuities) and from and after the death of the survivor of her two sisters (subject to and charged with the said annuities) the testatrix devised all and singular her said real estate unto *John Anthony Partridge* and *Louisa Isabella* his wife, during the term of their joint lives and

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the life of the survivor of them; with remainder to trustees during the lives of the said *J. A. Partridge* and his wife and the survivor of them in trust to preserve contingent remainders; and after the decease of the survivor of *J. A. Partridge* and his wife (subject to the said annuities) the testatrix devised her said real estate unto and to the use of *John Francis Partridge* (the eldest son of *J. A. Partridge*) during his life; with remainder to trustees during his life in trust to preserve contingent remainders; and after the decease of *J. F. Partridge* (subject as aforesaid) to the use of the first son of *J. F. Partridge* and the heirs of his body, in tail male; and in default of such issue to the use of the second, third, fourth, and every other son of *J. A. Partridge* and *Louisa Isabella* his wife, severally and successively according to their respective seniorities, and the heirs of their several and respective bodies in tail male; and in default of such issue to the use of the first and every other daughter of *J. A. Partridge* and his wife, then born or thereafter to be born, severally and successively according to their respective seniorities, and the heirs of their several and respective bodies in tail male; and in default of all such issue (subject as aforesaid) the testatrix devised her said real estate unto her own right heirs for ever. The will contained the following proviso:—

"Provided always and I do hereby declare and direct that the said *J. A. Partridge* and *Louisa Isabella* his wife, and the person and persons whom the daughters of the said *J. A. Partridge* and *Louisa Isabella* his wife shall marry, and every person who, by virtue of the limitations hereinbefore contained, shall become entitled to the possession or to the receipt of the rents and profits of the said real estate shall and do, within the space of three months next after the decease of the survivor of my said sisters, reside in and occupy the mansion-house, with the offices, buildings, yard, gardens, and appurtenances situate at *Cornwell* aforesaid, now occupied by myself and my said sisters, for the space of nine months at the least in every year, and maintain and keep the same and every part thereof in good and tenantable repair; and also shall and do within the space of one year next after they respectively shall so become entitled to the possession or to the receipt of the rents and profits of the same hereditaments and

premises take upon him and her and his or her issue respectively, and use in all deeds, letters and other writings to which they shall be parties or party, or which they respectively shall sign, the surname of *Penyston* only, and take and use no other surname, and also take and use the arms of *Penyston* only; and also do and shall within the space of one year next after they respectively shall become so entitled as aforesaid apply, sue for, and endeavour to obtain an Act of Parliament, or a proper license from the Crown, or take such other means as may be requisite or proper, to enable him and her respectively, and his and her issue, to take and bear the said name and arms of *Penyston*. And in case the said *J. A. Partridge*, or *J. F. Partridge*, or any other child of the said *J. A. Partridge* and *Louisa Isabella* his wife, or their issue, or the husband of any or either of their daughters, who by virtue of the limitations in this my will shall come into possession or receipt of the rents and profits of the said hereditaments and premises shall refuse or neglect to reside in and occupy the said mansion-house and premises at *Cornwell* aforesaid, or to take such surname and arms and to use the means which shall be requisite to enable and authorize him and them so to do within the said space of one year, then and in either of those cases the limitation hereinbefore contained of the said hereditaments and real estate to the use of him, her, or them so refusing or neglecting shall cease, determine, and become utterly void, and I devise all and singular the said hereditaments and real estate to the person or persons next in remainder under the limitations in this my will."

*Jane Penyston* died on the 29th of November, 1835. The testatrix, *Harriet Penyston*, died on the 29th of February, 1840.

*Frances Penyston*, spinster, at the date of her will and of her death, was seised in fee simple in possession of the two other undivided third shares of and in the mansion-house and hereditaments at *Cornwell*, and also of other real estate. She, by her will, dated the 8th of March, 1853, after charging her real estate with certain annuities, gave and devised all and singular her real estate unto *J. A. Partridge* and *Louisa Isabella* his wife, during their joint lives and the life of the survivor, with remainders over to the same persons, in the same order, and in precisely similar

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terms as were named and mentioned in the will of *Harriet Penyston*. And the will of *Frances Penyston* contained directions as to residing in the mansion-house, and as to taking and using the surname and arms of *Penyston*, and a gift over in default, in terms similar to (but not identical with) those contained in the will of *Harriet Penyston*. *Frances Penyston* died on the 13th of June, 1873. *J. A. Partridge* died on the 27th of February, 1861. *Louisa Isabella* his wife died on the 7th of April, 1858. On the death of *Frances Penyston*, *J. F. Partridge* duly entered into possession of and thenceforth until his death resided in the mansion-house at *Cornwell*, and duly assumed and continued to use the name and arms of *Penyston* in accordance with the directions contained in the two wills, until his death on the 7th of June, 1893. He never had any issue. *J. A. Partridge* and *Louisa Isabella* his wife had two other sons, viz., *Anthony William Partridge*, the second son, and *Edward Thomas Partridge*, the third son. *Anthony William Partridge* died on the 23rd of September, 1886, without having barred his estates in tail in remainder under the two wills. He had only three children, viz., *Anthony Francis Partridge* (the Plaintiff), his eldest son, *William Adolphus Partridge* (one of the Defendants), his second son, and *Robert Charles Partridge* (another of the Defendants), his third son. They were all infants, the Plaintiff being about fourteen years old. *Edward Thomas Partridge* was also a Defendant. The Plaintiff had not at any time since the death of *John Francis Penyston* resided in or occupied the mansion-house and premises at *Cornwell*, nor had he taken or used the surname or arms of *Penyston*.

The questions submitted for the opinion of the Court were:—

(1.) Whether or not the conditions and directions contained in the two wills as to residing in and occupying the mansion-house at *Cornwell*, and as to taking and using the surname and arms of *Penyston*, or any (and if so which) of such conditions and directions, were binding upon the Plaintiff during his infancy?

(2.) Whether or not the gifts over in the two wills respectively contained had taken effect, or, in the event of the same conditions and directions, or any of them, not being complied with during the infancy of the Plaintiff, did or could take effect, and, if so, in favour of what person or persons?

*Leeke*, for the Plaintiff:—

(1.) The condition as to residence does not apply at all to the existing state of circumstances, for, taking the clause literally, the period of three months from the death of *Frances Penyston* expired long before the Plaintiff could take the property and comply with the condition.

(2.) Reading the will as a whole, the meaning is, that each person taking the estate is to have twelve months within which to comply with the condition as to residence as well as with the condition as to taking the name and using the arms of *Penyston*.

(3.) Neither condition is applicable to an infant. An infant is entitled to the specified period from the time when he attains full age. An infant cannot choose his own residence; he has to reside where his guardian appoints; for educational reasons it would not be desirable for an infant to reside in a country house: *Simpson* on Infants (1); *Parry* v. *Roberts* (2).

Notwithstanding the authority of *Doe* v. *Yates* (3), the name and arms clause ought not to be held to apply to an infant.

*Ashworth James*, for the Defendant *W. A. Partridge*:—

The interest of my client will determine if that of his elder brother, the Plaintiff, fails: *Seymour* v. *Vernon* (4). It is, therefore, to my client's interest to contend that the Plaintiff's interest has not been forfeited. The condition requires an actual, not a mere nominal residence, and this could not properly be required of an infant: *Walcot* v. *Botfield* (5). In *In re Moir* (6) it was, no doubt, held that a condition requiring residence for six months in every year was complied with by keeping up the house, but this decision depended on the particular circumstances. Again, such a condition can only be binding on an infant if it is for his benefit. But, in fact, the whole clause relating to residence is so obscure in its language, that it should be held to be void for uncertainty.

(1) 2nd Ed. p. 82.
(2) 19 W. R. 1000.
(3) 5 B. & Al. 544.
(4) 33 L. J. (Ch.) 690.
(5) Kay, 534.
(6) 25 Ch. D. 605.

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*H. B. Howard*, for the other Defendants:—

The period of one year applies only to the name and arms clause, not to the residence clause.

The condition as to residence is binding on an infant, and by non-compliance with it the Plaintiff has forfeited his interest. The period of three months can only apply to the first taker. The requirement of residence applies to every person who becomes entitled to the possession of the estate.

As to the application of a condition to an infant, see *Simpson* on Infants (1); *Co. Litt.* (2); *Hearle* v. *Greenbank* (3); which authorities shew that *laches* will be adjudged in an infant, and that he can perform a condition which is for his benefit.

"Residence" does not mean actual physical residence; it is sufficient if the establishment is kept up: *In re Moir* (4). Ignorance of a condition is no excuse for its non-performance: *Astley* v. *Earl of Essex* (5). In *Parry* v. *Roberts* (6) there was nothing but a *dictum*, and the case turned on the construction of an obscure clause.

The gift over fits the condition, if the period of twelve months applies only to the name and arms clause. The time has not yet expired.

[NORTH, J.:—I do not intend to decide anything about the name and arms clause, but I think it would be right for the infant's guardians to take such steps as may be proper to enable him to assume the name and arms.]

[He referred also to *Bevan* v. *Mahon-Hagan* (7); *Doe* v. *Yates* (8); *Harrison* v. *Round* (9).]

NORTH, J. (after stating the effect of the will, and observing that it was very badly expressed, and that it could not have been intended that, in case there should be younger sons of

(1) 2nd Ed. p. 86.
(2) 246 b, 380 b.
(3) 1 Ves. Sen. 298, 304.
(4) 25 Ch. D. 605.
(5) Law Rep. 18 Eq. 290.
(6) 19 W. R. 1000.
(7) 27 L. R. Ir. 399.
(8) 5 B. & Al. 544.
(9) 2 D. M. & G. 190, 201.

*J. F. Partridge*, they should, on failure of the limitation in tail to his eldest son, be cut out altogether, continued) :—

It will be noticed that the limitations are all direct—not upon a condition of any kind—but they are to take effect respectively in due order as the previous estates determine, and so on to the very end, if none of the prior takers should think fit to bar the entail.

Then comes the proviso, which deals with several matters introduced by way of condition subsequent. They are not conditions precedent to the taking of the estate, but conditions requiring something to be done within three months and twelve months respectively after the time at which the taker has become entitled to the possession or the receipt of the rents and profits of the estate; by the non-performance of which the estate, which has been already vested, may be divested, and passed on to other persons lower down in the order of the limitations. [His Lordship read and commented on the first part of the proviso, requiring residence in the mansion-house, and continued :—]

Does the proviso mean that all the persons named are to be subject to the obligation of residence within three months after the death of the survivor of the two sisters of the testatrix? I do not think that is intended. My view is that all those persons are referred to as being possible takers, any one or more of whom might come into possession or receipt of the rents and profits at or within three months after the death of the surviving sister. Construing the clause as fairly as I can, I hold that it applies only to such of the persons who take under the limitations as come into possession or receipt of the rents and profits within three months after the death of the surviving sister *Frances*, who died in 1873. I do not feel at liberty to say that the phrase "within the space of three months next after the decease of the survivor of my said sisters" ought to be read as if it were written "next after he shall become entitled to the possession or the receipt of the rents and profits." When *Frances Penyston* died *J. A. Partridge* and his wife were both dead. *J. F. Partridge*, the first tenant in tail, was alive, and he died in 1893. There is no doubt that he strictly complied with the

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conditions as to residence and as to name and arms. In my opinion, in the events which have happened the condition as to residence does not apply to any one but him. That is my view of the construction of the clause. [His Lordship then read the condition as to the name and arms, and continued:—] The words differ from those in the prior part of the clause; they are, "shall and do within the space of one year next after they respectively shall so become entitled." Therefore, to prevent any possible question, I think it is right that the guardians of the infant Plaintiff, who has now succeeded to the estate, should take such steps as may be necessary to enable him to comply with this clause by assuming the name and arms of *Penyston*. Whether it is necessary to do so or not, still it is a prudent precaution to take, and I think they ought to take it.

I now come to consider the final clause—the gift over. That clause must have a fair construction put upon it, and, unless when so construed it imposes upon one of the parties the obligation of doing something, the omission of which has the effect of taking the estate away from him, the estate will not be taken away.

I agree with Mr. *Howard's* view of the construction of the clause. I think the reference to the space of one year does not apply to refusal or neglect to reside in and occupy the mansion-house and premises—that is, the first part of the condition. The second part is introduced by the alternative word "or," and then runs, "shall refuse or neglect to take such surname and arms, and to use the means which shall be requisite to enable and authorize him and them so to do within the space of one year;" and then it goes on, "then and in either of those cases," shewing that the testatrix has put two cases distinct from one another. The second case—that as to the use of the surname and arms—is the only one with regard to which the period of one year has been imposed, and I think it clear that the refusal or neglect for the space of one year, merely applies to the taking of the surname and arms, and the adoption of the proper means to obtain the right to use them.

What, then, is the effect of the clause? It is said that it does not apply to an infant. The Plaintiff, who came into pos-

session on the 7th of June, 1893, is now about fourteen, and *John Francis Partridge* having died on the 7th of June, 1893, more than three months have elapsed since that time, and therefore the question is, whether the infant Plaintiff was bound within those three months to enter into occupation of the house, and to continue to reside there for nine months in every year. In my opinion, the Plaintiff was not bound to do this, and he is entitled to the estate. As I pointed out just now, the effect of these limitations is not to give him the estate on condition that he resides and occupies the house, but they are expressed as taking away the estate from him if he does not fulfil the condition, and we must see on what precise event the estate is to go over. The only event mentioned is, if the person who becomes entitled to the estate "refuses or neglects" to reside in the house; and an infant cannot "refuse or neglect" to reside in a particular place if the persons to whom his legal custody and care are committed do not choose that he shall do so. The words are not if he "omit" to reside, or if he "does not reside," but if he "refuse or neglect" to reside; and, in my opinion, an infant, who cannot control or fix the place where he is to reside, cannot within the terms of this clause be said to "refuse or neglect" to reside at the place mentioned: and for this reason also the clause does not apply to the infant Plaintiff during his infancy.

It is conceded, and indeed I think it is clear, that no distinction can be drawn by reason of the tender years of the infant. I cannot see any reason why an obligation, which clearly could not possibly exist at the age of two, should arise at the age of ten, or fifteen, or twenty. I cannot draw any line during the period of legal infancy; and if an infant is not bound by the obligation at one time, no infant is bound by it up to the time at which he attains twenty-one.

As regards this question, the passages which have been referred to in *Coke* upon *Littleton*, seem to me in point. At p. 246 *b*, *Coke* says, having spoken first of all of a married woman: "And so it is of an infant; his *laches*, for not performing of a condition annexed to a state, either made to his ancestor or to himselfe, shall barre him of the right of the land for ever." That is, if

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there is a condition precedent which he ought to, and does not, perform, he will be barred by reason of its not having been performed. The other passage, at p. 380 *b*, is still more instructive. There the proposition of *Littleton* is: "No *lachesse* shal be adjudged in the heire within age;" and then *Coke* proceeds: "*Laches*, or *Lasches*, is an old French word for slacknesse or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a discent; or of his former right (as *Littleton* doth here put an example), by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases as well in the infant as any other."

The case of *Bevan* v. *Mahon-Hagan* (1), to which Mr. *Howard* referred, is very instructive. A testator bequeathed to the son of his daughter *A.*, who should first attain the age of twenty-one years, and should, before attaining that age, have taken and borne the surname of *H.* and the arms of the testator, certain articles therein specified, and in case there should be no son of *A.* who should attain that age and have previously assumed the said name and arms, then to the son of the testator's daughter *R.* who should first attain that age, and before attaining the same should have assumed the said name and arms. *A.* had one son, who died under twenty-one. *R.* had one son who attained twenty-one. It was proved to the satisfaction of the Court that *R.*'s son had, before attaining the age of twenty-one years, assumed the name of *H.*, and had after, but not before, he attained twenty-one, obtained a royal licence to assume the arms and name of the testator. That is, he, when an infant, had done part of what he was bound to do, but had not done the rest. It was held that the assumption of the name and arms of the testator by a son of the testator's daughter before he attained twenty-one years was a condition precedent to the vesting of the legacy in him, and that *R.'s* son had not complied with the condition, and that the gift over took effect. From this and other cases it is quite clear that if a condition precedent is imposed on an infant, and it can

(1) 27 L. R. Ir. 399.

be performed by him, and it is not performed, the limitation over is good and will take effect. But in the present case, as I have already pointed out, there is merely a proviso to defeat a vested estate, and it is made to depend, not upon the taker of the estate not doing the thing mentioned, but upon his refusing or neglecting to do it; and, in my opinion, adopting the view of Lord *Romilly*, in *Parry* v. *Roberts* (1), the condition as to residence is not one which the Plaintiff can be said to refuse or neglect to perform so long as he is an infant. Therefore, his omission to enter into the occupation of and reside in the house within three months after the death of *John Francis Partridge* has not divested the estate which he takes under the will.

I have referred only to one of the two wills. Part of the property passed under the will of *Frances Penyston*, but the conditions expressed in that will are substantially the same as those in the other. In one or two respects they are more fully expressed than in the will of *Harriet Penyston*. It is unnecessary, therefore, for me to refer in detail to the will of *Frances Penyston*. The remarks which I have made on the first will apply to both.

I am therefore of opinion, first, that the condition as to residence is not binding upon the Plaintiff at all; and secondly, that, if it is binding upon him at all, it is not binding upon him during his infancy. I decline to answer the question as to the taking and using the surname and arms of *Penyston*, for I am of opinion that the Plaintiff's guardians ought to take the necessary steps before the expiration of one year from the death of *John Francis Partridge* to prevent this question arising.

I answer the other questions by saying that the conditions and directions as to residence and occupation are not, in the events which have happened, binding at all, and at any rate not during the infancy of the Plaintiff; and that the gifts over have not, down to the present time, taken effect.

Solicitors for all parties: *W. H. Withall & Co.*

(1) 19 W. R. 1000.

W. L. C.

NORTH, J.
1893
Dec. 6.

## *In re* HEWETT.
## HEWETT *v.* HALLETT.

[1892 H. 4329.]

*Covenant to settle after-acquired Property—Severance of Joint Tenancy.*

A covenant by an intended husband and wife to settle the wife's after-acquired property:—

*Held*, to sever the wife's joint interest in personal estate created by a subsequent instrument.

THIS was the adjourned further consideration of an action commenced by originating summons for limited administration of the trusts of a voluntary settlement made by Sir *Prescott Gardiner Hewett*, deceased, dated August, 1883.

The Plaintiffs to the summons were *Agnes S. Prescott Hewett*, *Maud Sandys Hallett* (wife of *William Charles Hallett*, a defendant), who were the two surviving next of kin of Sir *Prescott Gardiner Hewett*, and the trustees of a settlement made on the marriage of Mrs. *Hallett* in October, 1880. The Defendants were the trustees of the voluntary settlement of 1883, of whom *W. C. Hallett* was one.

The marriage settlement of 1880, after the settlement of certain property of the intended wife, contained a covenant by the intended husband and wife with the trustees of the settlement: "that if the said *Maud Sandys Hewett* now is or if at any time or times during the said intended coverture she or the said *William Charles Hallett* in her right shall at one time and from one source become entitled by descent devise bequest gift representation purchase or otherwise to any real or personal property over and above the value of £300 or upwards for any estate or interest whatsoever (except jewels trinkets ornaments plate plated goods pictures water colour and other drawings furniture prints engravings china and books which it is hereby agreed shall belong to the said *Maud Sandys Hewett* for her separate use) then and in every such case the said *William Charles Hallett* and *Maud Sandys Hewett* and all other necessary parties shall at the cost of the trust estate and as soon as circumstances

will admit convey assign surrender and assure the said real or personal property to the said trustees or trustee upon trust that they or he shall with all convenient speed and in such manner as they or he shall think fit sell or call in or convert into money the said real or personal property except such parts thereof as shall consist of money or of an annuity or annuities or other real or personal property to which the said *Maud Sandys Hewett* now is or she or the said *William Charles Hallett* in her right shall so become entitled as aforesaid for the life of the said *Maud Sandys Hewett* only or for a term of years determinable on her death and shall stand possessed of the monies to arise from such sale calling in or conversion into money and of such parts of the said property as shall consist of money and of the securities upon which such monies respectively may be invested and of the interest dividends and annual produce thereof," upon trusts declared by reference to the prior settlement of property of the intended wife for the benefit of the wife, husband, and issue of the marriage.

By the voluntary settlement of 1883, the trusts of certain personal property vested in trustees were declared. An ultimate trust, in case of the failure of prior trusts, was given "for the next of kin of the said *Prescott Gardiner Hewett*."

Sir *Prescott G. Hewett* died on the 9th of June, 1891. His next of kin were Sir *Harry Hammerton Hewett* (who died on the 22nd of July, 1891, without having severed his joint tenancy), and the Plaintiffs *Agnes Sarah Prescott Hewett* and *Maud Sandys Hallett*. On his death all trusts declared by the settlement of 1883, prior to the trust for the next of kin of Sir *Prescott Gardiner Hewett*, failed.

A question was raised on further consideration between *Agnes Sarah Prescott Hewett* on the one side, and the other Plaintiffs on the other side, whether the covenant to settle after-acquired property contained in the marriage settlement of October, 1880, operated to sever the joint tenancy given to the next of kin of Sir *Prescott Gardiner Hewett* by the settlement of 1883.

*S. Hall*, Q.C., and *Rowden*, for Miss *Hewett*:—

A covenant to settle after-acquired property operates as a

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severance of a joint tenancy to which the wife was contingently entitled at the date of the settlement: *Caldwell* v. *Fellowes* (1), followed in *Baillie* v. *Treharne* (2), a case overruled on another point; *Burnaby* v. *Equitable Reversionary Interest Society* (3). There is no reason why the same principle should not apply to after-acquired property coming to the wife under an instrument coming into existence after the settlement. The covenant applies to property taken under such instrument; an equitable interest does not require a special instrument of conveyance: *Holroyd* v. *Marshall* (4). The covenant does not merely impose an obligation to sever, but operates as a severance, without anything further being done to complete the severance; by a mere agreement to sever a severance is effected: *Brown* v. *Raindle* (5).

*Capron*, for Mrs. *Hallett* and the trustees of her settlement:—

A joint interest cannot be severed by anything done previously to the time when the instrument creating the interest was executed. In all the cases cited the joint interest was existing, though reversionary, when the deed operating as a severance was executed.

In this case, however, the settlement did not operate upon Mrs. *Hallett's* joint interest, because the trusts of the settlement were for immediate sale, and not applicable to an interest afterwards called into existence: *Scholfield* v. *Spooner* (6); *In re Mackenzie's Settlement* (7); *In re Jackson's Will* (8).

NORTH, J.:—

The conclusion I come to is that this covenant to settle after-acquired property has the effect of severing the joint tenancy, although there was no interest in it existing in 1880 when the settlement was made. That settlement was made with the intention to provide for every case: "That if the said *Maud Sandys Hewett*" (that is the lady about to be married) "now is or if at any time or times during the said intended coverture she or

(1) Law Rep. 9 Eq. 410.
(2) 17 Ch. D. 388.
(3) 28 Ch. D. 416.
(4) 10 H. L. C. 191.
(5) 3 Ves. 256.
(6) 26 Ch. D. 94.
(7) Law Rep. 2 Ch. 345.
(8) 13 Ch. D. 189.

the said *William Charles Hallett* in her right shall at one time and from one source become entitled by descent devise or otherwise to any real or personal property over and above the value of £300 or upwards for any estate or interest whatsoever (except jewels trinkets ornaments plate plated goods pictures water colour and other drawings furniture prints engravings china and books which it is hereby agreed shall belong to the said *Maud Sandys Hewett* for her separate use) then and in every such case the said *William Charles Hallett* and *Maud Sandys Hewett* and all other necessary parties shall"—not "will," if they think fit, but "shall;" they are bound—"at the cost of the trust estate and as soon as circumstances will admit"—assign to the trustees to hold upon the trusts of the settlement. The trusts were declared in respect of certain property belonging to the lady which she had at the time, which had first been settled. This covenant was made by the deliberate act of the parties for the purpose of catching any other property in which at the time she had any estate or interest whatever, not being less than £300, or being within the excepted items; and also any such other property as she might at any time acquire during the continuance of the coverture, whether anticipated or not; and it would apply to everything that came as an entire novelty from a perfect stranger just as well as to property which was in the expectation of the parties at the time at which the settlement was made.

Then what happens is this. Three years after that marriage settlement a voluntary settlement is made by Sir *Prescott Hewett*, in which there is an ultimate trust, if certain prior trusts fail, for his next of kin. That, as soon as the settlement was executed, did give a contingent interest to any person who might prove to be entitled under those words. Of course, it could not then be ascertained that these parties could take anything under it, because the next of kin of Sir *Prescott Hewett* were the persons contingently entitled, and they could only be ascertained at the time at which he died. I do not, therefore, agree in the view that the settlement did affect this particular property at the time at which the voluntary settlement was made in 1883; though, no doubt, a possibility of succeeding to that property as one of the

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next of kin might thenceforward have been in the contemplation of the parties. But when Sir *Prescott Hewett* died it was known who his three next of kin were, and those persons at once had an immediate interest. I do not say an interest in possession, but they had a clear interest in the property, although, no doubt, it might be a very remote interest, and possibly might fail; but there was an interest which vested in the next of kin at that time, and Mrs. *Hallett's* share in which, according to my view of the covenant, the parties had bound themselves to convey and assure when circumstances should permit.

Then the only question is whether the covenant had the effect of severing the joint tenancy. In my opinion it had, and I think the case comes within *Caldwell* v. *Fellowes* (1). I quite admit that the facts were somewhat different there; but I mean it comes within the principle of the decision. In that case the recited agreement was to settle the property "to which the wife is entitled or may be entitled," and then the covenant was to settle all the estate and effects, both real and personal, "of which the wife is now seised or possessed, or of which she shall hereafter become seised or possessed." In that case there was a reversionary interest existing at the time at which the settlement was made. That, of course, admits a distinction from the present case; but, in my opinion, it makes no difference whatever in principle, because it was intended to catch what the parties did not know of at the time—whether the wife had it at the time, or whether she would afterwards get it. The observations of Lord Justice *James*, who as Vice-Chancellor decided that case, point to what the intention of the parties was, and that intention seems to me to be precisely the same intention as there is in this covenant, namely, that it should apply to property which was not included in the settlement, whether the interest then existed, or was acquired subsequently. As he says there (2), "Is there anything else to say that we are not in this instance to take the literal meaning of the words? The mere fact that she recites certain specific funds, but does not recite this particular property, is not sufficient to indicate an intention that any property which she did not happen to think of, or which was

(1) Law Rep. 9 Eq. 410. (2) Law Rep. 9 Eq. 417.

unknown to her, should not be included in the settlement." Then he points out from the words used that it was the intention and agreement of all parties that the whole of the property should be so settled. What property? The property which comes within the scope of the covenant, whether it is property which the wife is possessed of at the time, or which she acquires during the coverture. Then he says: "If that be so, if upon taking the whole instrument together, it appears to have been part of the agreement and intention of all parties that the whole of the property should be settled, *cadit quæstio.*" It is quite clear that Mrs. *Hallett's* interest in the joint property does come within the covenant in the present case.

Then the next point is whether, if the interest of Mrs. *Hallett* is included in the covenant, the covenant does operate as a severance or not. In my opinion it does, because it is quite clear that any agreement to sever made by a joint tenant, if it binds the parties, if it is made for value, is just as effectual as if the intention of the parties expressed in the agreement had actually been carried out by a conveyance of the property. There are many cases in the books in which an agreement without an actual completion of the assurance has been held to bind the property; and in particular there is the case, which Mr. *Hall* referred to, of *Brown* v. *Raindle* (1), which seems to me exactly in point. That was a case of a copyholder having power to bar the widow's freebench by surrender, and it was held that any act by him for valuable consideration would bar her in equity, that such act was just as good as if it had been completed by a surrender; and the Master of the Rolls says in the judgment: "A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it. Therefore let her convey all her estate and interest in the copyhold premises according to the deed of the 2nd July, 1792, subject to redemption." In my opinion, therefore, the agreement to settle has just the same effect as if it had been completed by a settlement being executed. See also *Baillie* v. *Treharne* (2).

Then another point was suggested, that this property was hardly

(1) 3 Ves. 256. (2) 17 Ch. D. 388.

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within the scope of the settlement, because the purposes to which the property was to be conveyed to be held under the settlement do not fit in. Reliance was placed upon Lord Justice *Bowen's* observations in *Scholfield* v. *Spooner* (1); but I think that argument is answered by the facts. There is no difficulty whatever in making the trusts fit in, as the Master of the Rolls pointed out in the judgment he gave on behalf of the Court of Appeal in *In re Jackson's Will* (2). I think, therefore, that point does not come to anything. The result is, in my opinion, that the settlement made in 1880 did operate as a severance of this property, upon the death of Sir *Prescott Hewett* in 1891. Therefore at that time, when the next of kin came in as joint tenants, there was an agreement which, immediately after the property vested in them as joint tenants, had the effect of severing that joint tenancy. The result will be that Mrs. *Hallett*, having severed her share, the rest of the property remained subject to the joint tenancy of the other two; and upon the death of the son without severing the joint tenancy, Miss *Hewett* then became entitled to the son's share as well as her own, and became solely entitled to those two-thirds.

Solicitors for all parties: *Currey, Holland, & Currey.*

(1) 26 Ch. D. 94. (2) 13 Ch. D. 189.

D. P.

## *In re* CENTRAL SUGAR FACTORIES OF BRAZIL.

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Dec. 8.

### FLACK'S CASE.

*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163—*Winding-up—Foreign Action—Injunction.*

In the winding up of an English company whose assets were in *Brazil*, a part-performed contract for the sale of the Brazilian assets was agreed to be sold for £36,000. A creditor resident in *England* laid an embargo on the Brazilian assets, by levying execution on a judgment of a Brazilian Court, and thereby prevented payment of the £36,000. The creditor was ordered to remove the embargo on terms of a sum being placed to a separate account to meet any claim he might establish.

THIS was a motion by the liquidator in a compulsory winding-up for an order on *D. L. Flack*, a creditor of the company.

The *Central Sugar Factories of Brazil, Limited*, were incorporated by registration in 1881. The company was ordered to be wound up compulsorily in December, 1886. There were outstanding mortgage debentures at that time in tontines, to the amount of nearly £170,000, charged on the whole of the undertaking, property, and assets of the company. The greater part of the company's assets were in *Brazil*, and consisted of sugar factories, tramways, and machinery. The debts of the company in *Brazil* amounted to about £170,000. In January, 1891, the liquidators of the company made a provisional agreement with *C. F. Hargreaves*, afterwards sanctioned by the Court, for the sale to *C. F. Hargreaves* of all the assets of the company in *Brazil* for £50,000, and an undertaking by *C. F. Hargreaves* to discharge all the liabilities of the company to planters and other creditors in *Brazil* to an amount not exceeding £100,000. It was stipulated that the £50,000 should be paid by instalments with interest. A portion of the price and some interest had been paid by *C. F. Hargreaves* to the liquidator. In July there was owing under the contract £42,000. Nothing had since been paid. An offer was made by Messrs. *Davidson, Unwin & Co.*, on behalf of certain persons in *Brazil*, to purchase the interest of the company under the agreement with *C. F. Hargreaves* for £36,000 in cash.

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The offer was agreed to by a meeting of debenture-holders, and accepted by the liquidator and sanctioned by the Court, on the 9th of August, 1893. It was in evidence that it was impossible to carry out the contract with Messrs. *Davidson, Unwin & Co.* by reason of an embargo or attachment that had been laid on the property of the company in *Brazil* in certain legal proceedings taken in that country by *D. L. Flack*, the Respondent to this motion, and that unless the embargo or attachment were removed the contract would fall through.

*D. L. Flack* was a creditor of the company to the extent of about £1700 in respect of coal and fuel sent from *England* and delivered in *Brazil* and costs. He had obtained a judgment in the Court of final appeal in *Brazil* against the company for his debts, and had proceeded to levy execution on the property of the company in *Brazil* by means of the attachment or embargo above referred to.

The liquidator now moved that the Respondent, *Daniel Ludgate Flack*, might be ordered, without prejudice to any right which he might have against the purchase-moneys coming to the Applicant under the order made on the 9th of August, 1893, to withdraw the attachment or embargo which he had placed upon the hereditaments and premises forming part of the assets of the company situate in *Brazil*, and comprised in the agreement between the company, the liquidator, and *Hargreaves*.

The debts due to the Respondent had not been expressly allowed by the liquidator in any list of creditors; but the liquidator had by letter admitted that the amount sued for in *Brazil* was due for the purpose of assisting the Respondent to establish a claim and get some payment in *Brazil*. The Respondent *Flack*, by his affidavit in opposition to the motion, asserted that he had not proved for his debt in *England*, that he had taken the proceedings in *Brazil* with the knowledge and approbation and at the instigation of the liquidator, who was aware of the proceedings throughout, and he claimed that, according to Brazilian law, as a creditor who had supplied goods to an industrial enterprise, he was entitled to priority.

The liquidator in reply deposed that he never knew or suspected that proceedings were being taken by the Respondent

except to compel payment by *Hargreaves* in a manner pointed out by him in correspondence.

On the 4th of August, 1891, *Flack* wrote to the liquidator to the effect that *Flack's* representative in *Brazil* had been unable to get his claim allowed, asking for full particulars.

The reply of the liquidator dated the 5th of August, 1891, was, so far as material:—

"I am in receipt of your letter of yesterday's date. I regret to hear what you tell me about the result of your application for payment of your debt in *Pernambuco*. I understood that it had been proved there, and under these circumstances it should fall under the obligations of the purchaser of the factories, who had to settle all Brazilian claims.

"It is a matter on which you should have legal advice. I am advised that the purchase-money, which is £50,000, will be appropriated to satisfy the claims of the debenture-holders, and unless you can get payment in *Brazil* your prospects of a dividend are not good."

In the course of further correspondence the liquidator, for the purpose of enabling *Flack* to establish the amount of his debt in *Brazil*, wrote on the 7th of October, 1891:—

"Referring to your recent call on me, I find, on examination of the company's books and documents, that you are a creditor for £1622 12*s.* 3*d.* for coals delivered to the company in *Brazil* in the autumn of 1886 as follows."

After setting out the items the letter proceeded:—

"This is a debt which I do not dispute. With regard to your claim for loss and expenses amounting to £112 12*s.* 11*d.*, I should be prepared to admit £75 8*s.*; but the balance consists of expenses which do not appear to be chargeable against the company."

*Swinfen Eady*, Q.C., and *Eve*, for the liquidator:—

The creditor will not be allowed, by taking legal proceedings during a winding-up, to get an advantage over others or to injure the assets, which are a trust for the benefit of all the creditors. The Court in such a case will prohibit a person it has jurisdiction over by mandatory order, if necessary, from carrying on legal

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proceedings out of the jurisdiction: *In re Oriental Inland Steam Company* (1). The creditor is not entitled to any priority by reason of having obtained the embargo: *In re South Eastern of Portugal Railway Company* (2). The liquidator is willing to have a sufficient part of the £36,000 placed to a separate account in order that the Respondent may establish in *England* any claim he may be entitled to.

*S. Hall*, Q.C., and *J. G. Wood*, for *Flack*:—

This case is different from *In re Oriental Inland Steam Company*, because here there was practically a winding-up in *Brazil*, and *Flack* was a creditor in respect of a Brazilian debt of a nature that under Brazilian law has priority. It would be inequitable to prevent his enforcing his priority in the same way as other creditors in *Brazil* who have similar priority can enforce their priorities because he is residing here.

*Swinfen Eady*, in reply:—

*Flack* is an English creditor in respect of English contracts.

NORTH, J.:—

I must grant an injunction. I do so upon the authority of *In re Oriental Inland Steam Company*, where the matter is put in this way, that the assets of the company are held upon a trust, as it were, for the persons entitled to them; and the Court treated the position of the claimant in that case upon the footing that one *cestui que trust* had got possession of trust property after the property had been subjected to the trust. That being so, the *cestui que trust* must bring it in for distribution with the other property of the trust. That is the principle applied there, and it seems to me to apply here in the same way. Whether the creditor, Mr. *Flack*, submitted to the jurisdiction or not, seems to me to be immaterial. The Court restrains creditors from proceeding against the property of the company which is being wound up, regardless of whether they consent or not, or whether they are bound by proof or not. It stops all proceedings against the assets of the

(1) Law Rep. 9 Ch. 557. (2) 17 W. R. 982.

company; and those are the assets which we have to deal with in this case. Then there is this to be said: There is evidence that a sale can be made for £36,000 which will go off if this creditor is allowed to set up against the property the judgment which he has obtained in *Brazil.* To complete the transaction, the property must be conveyed free from this judgment, and it is a case in which I ought to prevent his depriving the whole of the persons interested in the assets of the company of a good asset by insisting upon this right of his own. I think, therefore, I am bound to compel him to withdraw his claim, taking care to preserve for him such security as he has by the effect of the judgment. I think that will be accomplished by directing that the Official Liquidator shall, out of the proceeds of the sale, pay, in a way which may be agreed upon, the sum of £3000—the amount suggested—to answer the claim made by Mr. *Flack* in respect of the judgment which he has obtained abroad. The amount is not in dispute; but the question as to the right to recover it out of the assets of the company according to English law will remain to be decided, recognising the fact that he has by the Brazilian law obtained a judgment (the details of which I have not exactly before me on the present evidence) against the property of the company. He has succeeded in maintaining it in the Court of Appeal, and finally in the ultimate Court of Appeal.

The Official Liquidator should undertake to proceed forthwith to have it decided what claim by Mr. *Flack* is to be allowed against the £3000. The *onus* of having the matter determined is, I think, upon the Official Liquidator, who is the moving party, and such extra costs as fall upon the first mover should be borne by him. I reserve the costs of this motion until the claim is disposed of.

Solicitors for the Official Liquidator: *Ashurst, Morris, Crisp, & Co.*

Solicitors for Respondent: *Ince, Colt, & Ince.*

D. P.

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Dec. 13, 14.

# BARNARD *v.* TOMSON.

[1893 B. 485.]

*Building Society—Dissolution—Priority of Payment of Members.*

The rules of a building society, registered in 1875 under the *Building Societies Act*, 1874, fixed the amount of each share at £12, and provided that any unadvanced member who might desire to withdraw from the society should, by giving one month's written notice to the directors at a monthly meeting, be entitled to receive back the net amount of his monthly subscriptions paid in, but if more than one member should give notice to withdraw at one time, they should be paid in rotation according to the priority of notice, but the directors should not be compelled to pay more than one applicant for withdrawal at any one monthly meeting. Early in 1889 the auditors discovered that the society had suffered a serious loss through the defalcations of the secretary. At the annual meeting on the 16th of April this was made known to the members, and it was resolved to appoint an accountant to go through the books and submit a statement at a subsequent meeting. An accountant was accordingly engaged, and, on the 26th of July, he issued a report to the members, with a profit and loss account for the year ending the 28th of February, 1889, and a balance-sheet at that date, which shewed a deficiency of £7000. He recommended that steps should be taken to reduce the capital of the society, but said there was no reason why the society should not, with judicious and economical management, have a good future before it. At an adjourned meeting on the 30th of July the accountant's report and balance-sheet were adopted by the members, and it was resolved that it was desirable that the nominal share of £12 should be reduced to £10, in order to meet the losses. The rules of the society were altered, and at a special general meeting on the 12th of February, 1890, the altered rules were adopted, and the reduction of the shares to £10 was sanctioned. The altered rule as to the withdrawal of members provided that any member, by giving one month's written notice, should be entitled to withdraw the amount standing to his credit in the books of the society, and that the amount due from the society to each member in respect of any share or shares held by him on the 28th of February, 1889, should be deemed to be five-sixths of the net amount paid on such share or shares, and no member should be entitled to receive back from the society, should he withdraw his share or shares so held on the 28th of February, 1889, more than the amount so deemed to be due to him. On the 11th of November, 1892, an instrument of dissolution of the society was executed, pursuant to sect. 32 of the *Building Societies Act*, 1874, and it was registered on the 16th of November:—

*Held*, that the members were bound by the rules from time to time made, and therefore by the reduction of the shares, but that members who

had given notice to withdraw, and whose notices had matured before the date of the deed of dissolution, were, notwithstanding the winding-up, entitled to be paid in priority according to the dates of their notices.

## TRIAL OF ACTION.

The action was brought by an unadvanced member of the *Tabernacle Permanent Building Society*, against the trustees of an instrument of dissolution of the society and some other members of the society, for the purpose of ascertaining the rights *inter se* of different classes of members.

In the year 1847 the society was established, and on the 10th of September, 1875, it was registered under the *Building Societies Act*, 1874.

By the rules registered in 1876 the amount of each share was fixed at £12.

Early in the year 1889 the auditors of the society discovered or suspected that the then secretary had been guilty of irregularities in the discharge of his duties, and had thereby caused the society considerable loss.

These facts were reported by the auditors to the directors about the 5th of April, 1889. On the 6th of April, 1889, notice of the annual meeting of the society, to be held on the 16th of April, was sent by the directors to the members. This notice stated that the auditors had for a considerable time been examining the books of the society, and that, in consequence of the same having in their opinion not been properly kept, their labours were not yet concluded. Consequently the directors would not be able to present the annual report, and would propose at the meeting that it should stand adjourned to a later date to be agreed upon. At the meeting on the 16th of April the auditors informed the members that they suspected the secretary of malpractices which would probably result in losses to the society. A resolution was passed that the auditors should engage the services of a public accountant to go through the books and submit a statement of accounts at a subsequent meeting. The meeting was adjourned to the 18th of June. The auditors engaged an accountant in accordance with the resolution, and he attended at the adjourned meeting on the 18th of June, and informed the members that the secretary had misappropriated

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the society's moneys, and that very serious losses would result to the society. The meeting was again adjourned for six weeks. On the 26th of July, 1889, the accountant issued his report, addressed to the shareholders. Annexed to it in schedules was a profit and loss account for the year ending the 28th of February, 1889, and a balance-sheet at that date. The report contained the following statements:—

"My investigation has extended over a period of eight years, defalcations having been discovered as far back as the early part of 1881.

"I have already explained to you verbally, at the meeting held on the 18th of June last, the methods adopted by the late secretary in the perpetration of the frauds against your society.

"Apart from the question of fraud, the books of the society have been kept in a careless and unbusinesslike manner.

"The item 'Reserve Fund,' which has been appearing in your printed accounts, is misleading.

"It represents a fund formerly invested, part in Consols and part with another building society, but withdrawn in September, 1887, the society lending the amount to itself at 4 per cent. interest, and using it for ordinary business purposes.

"The gross deficiency, as far as can be ascertained, inclusive of loss on property in hand, is over £7000.

"The amount the society has now to make provision for is that shewn in the balance-sheet—viz., £5239 1s. 1*d.*

"Under the circumstances probably the best course for the society to adopt would be to take the necessary steps to reduce the capital; otherwise the payment of dividends until the capital is again intact might probably give rise to difficulty. There is no reason why the society should not, with careful, judicious, and economical management, have a good future before it, and, if the shareholders approve, a sinking fund could be created for the purpose of making good the loss now suffered to those of the present shareholders who maintain their connection with the society.

"The rules of the society might with advantage be revised."

The adjourned meeting was held on the 30th of July, 1889.

The accountant's report and balance-sheet were adopted, and a resolution was passed "that it is desirable that the nominal share of £12 be reduced to £10 per share." The object of this reduction was to meet the above losses. The affairs of the society were afterwards conducted on the footing of this reduction. On the 12th of February, 1890, at a special general meeting of the society, altered rules were read and were adopted as the rules of the society, and the reduction of the shares was sanctioned.

The rules of the society in force from the 20th of January, 1876, to the 12th of February, 1890, contained the following provisions relating to the withdrawal of shares:—

Rule 18: "That any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings, be entitled to receive back the net amount of monthly subscriptions paid in. That, if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice, provided always that the widows and children of deceased members shall have the precedence. But the directors shall not be compelled to pay more than one applicant for withdrawal at any one monthly meeting, and in all cases of the withdrawal of shares, subscriptions in arrear, and all fines incurred previous to any such application, shall be deducted from the amount which the member shall be entitled to receive."

The rules as altered on the 12th of February, 1890, contained the following:—

Rule 21: "Any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings, and leaving his pass-book at the chief office, be entitled to withdraw the amount standing to his credit in the books of the society. If more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice: Provided always, that the widows and children of deceased members, when entitled, shall have the precedence. The directors, however, shall not be required to pay

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more than one applicant for withdrawal at any one monthly meeting, and in all cases of the withdrawal of shares, subscriptions in arrear, and all fines incurred previous to any such application, shall be deducted from the amount which the member shall be entitled to receive. Any share withdrawn before it has been twelve months in existence shall forfeit any interest or bonus which may have been credited or paid upon it, and the board may, from time to time, fix and charge a withdrawal fee on the shares, of such amount as may be necessary, to provide for any losses that may have arisen, or may be expected to arise, in connection with the carrying on of the business, or with property on the hands of the society."

Rule 21a: "The amount due from the society to each member in respect of any share or shares held by him on the 28th of February, 1889, shall be deemed to be and be taken as five-sixths of the net amount paid on such share or shares, and, notwithstanding anything herein contained to the contrary, no member shall be entitled to receive back from the society, should he withdraw his share or shares so held on the 28th of February, 1889, as aforesaid, before the happening of the event mentioned in rule 7b, more than the amount so deemed to be due to him."

Rule 7a: "Until the provisions of rule 7b are complied with, the dividends payable to the holders of fully paid shares shall not exceed the rate of 5 per cent. per annum upon the amounts due to them from the society, as defined by rule 21a, and the balance of net profits (if any) in each year, after the payments of such dividends, shall be accumulated until the accumulations amount to a sum equal to one-sixth of the amount paid upon the shares then held by members which were also in existence on the 28th of February, 1889."

Rule 7b: "Out of this sum, when accumulated, each member shall be entitled to receive in respect of each share then in his possession, and which was in existence on the 28th of February, 1889, one-sixth of the nominal value of such share at that date—viz., in respect of a fully paid-up share of £12, the sum of £2."

On the 15th of September, 1888, *Thomas Sochon*, one of the Defendants, who held two fully paid shares, gave notice of with-

drawal. On the 10th of September, 1889, *Elizabeth Sheppard*, another Defendant, who had two fully paid shares, gave notice of withdrawal. On the 26th of February, 1890, *J. Knight*, another Defendant, who held 103 fully paid shares, gave notice of withdrawal, claiming to be paid, at the rate of £12 per share, £1236. On the 27th of October, 1892, *W. T. Yates*, another Defendant, who held twenty-one fully paid shares, gave notice of withdrawal.

A dispute arose between the Defendant *Knight* and the society as to whether his notice of withdrawal was subject to the rules as amended or to the rules in existence at the time when he became a member of the society, and the dispute was referred to arbitration under the provisions of the *Building Societies Act*, 1874, and the rules of the society.

An order was made in Chambers on the 24th of January, 1891, and was ultimately affirmed by the House of Lords on the 31st of May, 1892 (1), that the arbitrators should state in the form of a special case for the opinion of the Court the questions of law arising in the course of the arbitration.

The arbitrators accordingly stated a case for the opinion of the Court, and the Queen's Bench Division gave an opinion in favour of the Defendant *Knight*, that his notice of withdrawal was subject to the rules in existence at the time when he became a member of the society. The society appealed; but the Court of Appeal, on the 8th of August, 1892 (2), held that they had no jurisdiction to hear the appeal.

The question in dispute was then again brought before the arbitrators, and ultimately, on the 13th of October, 1892, they awarded that the sum of £1236 was to be paid by the society to the Defendant *Knight* in respect of his shares, and that the said sum was to be paid pursuant to the notice of withdrawal of the 26th of February, 1890, and in accordance with rule 18 of the rules of the society in existence at the time when he became a member of the society, and they ordered the society to pay him his taxed costs of the reference. The costs had been paid by the society to *Knight*, but no part of the £1236 had been paid to him.

(1) [1892] A. C. 298. (2) [1892] 2 Q. B. 613.

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The statement of claim alleged that there were 196 members of the society, and that of them forty-six had given notices of withdrawal under one or other of the rules, and at varying times, some before the fact that losses had been incurred was known to the members; some after the fact was known, but before the reduction of the shares; and some after the reduction of the shares had been assented to. The Defendant *Knight* never assented to the reduction of the shares, and 150 members (including the Plaintiff) gave no notices of withdrawal.

On the 11th of November, 1892, an instrument of dissolution of the society, pursuant to s. 32 of the *Building Societies Act*, 1874, was duly executed by the statutory number of members. On the 16th of November, 1892, the instrument was duly registered under the Act. The Defendants *Tomson*, *Hughes*, and *Hill* were the trustees appointed by the instrument.

In carrying out the trusts of the instrument, questions had arisen as to the respective rights and priorities of the following five classes of the members:—

(*a*) Those giving notice of withdrawal before the fact that losses had been incurred was known.

(*b*) Those giving notice of withdrawal after the fact that losses had been incurred was known, but before the reduction of the shares.

(*c*) Those giving notice of withdrawal after the reduction of the shares had been assented to.

(*d*) Those giving no notice of withdrawal.

(*e*) The members who never assented to the reduction of the shares.

The Plaintiff claimed that the respective rights and priorities of the above-mentioned classes might be ascertained and declared; an inquiry to which of such classes each member of the society belonged; administration (if and so far as necessary) of the trusts of the instrument of dissolution.

By the books of the society it appeared that twenty-eight notices of withdrawal were given in April, 1889; seven in May; six in June; two in July; one in August; two in September; and no more up to the end of that year.

*S. Hall*, Q.C., and *Ashton Cross*, for the Plaintiff:—

On the true construction of the rules they do not give to a member who has given notice of withdrawal any right to priority of payment under the circumstances. The rules as to withdrawals apply only so long as the society is carrying on business as a going concern, and not known to be insolvent: *Pepe* v. *City and Suburban Permanent Building Society* (1); *In re Sunderland 36th Universal Building Society* (2); *In re Mutual Society* (3). The rights of the members were, so to speak, crystallized when they had notice that the society was in difficulties and practically insolvent. This notice was at any rate given by the accountant's report. The rules themselves expressly provide that widows and children of deceased members shall have priority over withdrawing members. *Walton* v. *Edge* (4) is distinguishable. That decision depended on the construction of rules which differed from those of the present society. No rule of law was laid down that a member of a building society who has given notice of withdrawal is entitled to a first charge on the assets. Payment in rotation, as is shewn by *In re Mutual Society*, only means that for convenience, while the society is a going concern, the withdrawing members are to be paid in the order of their notices. No first charge on the assets is given.

All the members, including *Knight*, are bound by the alteration in the rules: *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), s. 18.

[NORTH, J.:—Are not his rights fixed by the award?]

He did not, by reason of the award, cease to be a member of the society; he remained a member, and subject to all the incidents of membership. His rights are determined by the instrument of dissolution: *Building Societies Act*, 1874, s. 32. That instrument states that *Knight* has £10 per share standing to his credit in the books of the society, and this, by virtue of sect. 32, overrides the award.

Sir *A. T. Watson*, Q.C., and *Beddall*, for the trustees of the instrument of dissolution.

(1) [1893] 2 Ch. 311.
(2) 24 Q. B. D. 394.
(3) 24 Ch. D. 425, n.
(4) 10 App. Cas. 33.

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*Everitt*, Q.C., and *Boome*, for the Defendant *Sochon*, representing the class (*a*) of members:—

*In re Mutual Society* (1) has always been distinguished, if not dissented from. A right of priority acquired before a winding-up remains after a winding-up: *Walton* v. *Edge* (2); *In re Alliance Society* (3); *In re Sunderland 36th Universal Building Society* (4). The notices of withdrawal given by the members of class (*a*) had matured before there was any suspicion of the insolvency of the society. The right of priority has not been lost by the members agreeing to accept £10, instead of the £12 originally credited on their shares. The award in favour of *Knight* is not binding on the other members. The award was wrong in law, and the opinion of the Court, which was not subject to appeal, could not give legal validity to a wrong award. The opinion of the Court had not the effect of a decision: *In re Knight and Tabernacle Permanent Building Society* (5).

*Oswald Norman*, for the Defendant *Elizabeth Sheppard*, representing the class (*b*) of members.

[It appeared that this Defendant had assented to the reduction of the shares.]

*Macoun*, for *Hughes*, representing the class (*c*) of members:—

*Hughes'* notice matured before the dissolution. The accountant's report did not shew that the society was insolvent. The new rules in effect rescinded the old ones, and were substituted for them, and the priority given by the old rules came to an end. The class (*c*), who gave notice under the new rules, obtains priority over everyone else. The Defendant *Knight* is bound by the new rules: *Pepe* v. *City and Suburban Permanent Building Society* (6). The award ascertained the amount due to him, but the direction for payment contained in it cannot be carried out now. He has no right to priority.

*Swinfen Eady*, Q.C., and *Peterson*, for the Defendant *Knight*:—

The award is binding on all the members of the society. The

(1) 24 Ch. D. 425, n.
(2) 10 App. Cas. 33.
(3) 28 Ch. D. 559.
(4) 24 Q. B. D. 394.
(5) [1892] 2 Q. B. 613, 617.
(6) [1893] 2 Ch. 311.

reduction of the shares was only temporary, not irrevocable. The reduction might have been a proper mode of meeting the large loss which had been incurred, but it does not prove that the society was insolvent. The contract with the members as to the withdrawal of their shares cannot be altered in this way: *Auld* v. *Glasgow Working Men's Building Society* (1). *Knight* is entitled to be paid in priority to the members who gave notice of withdrawal after he did.

*S. Hall*, in reply:—

The argument that the rules apply only to the society as a going concern has not been answered. The question is one of construction of the rules. The award fixed the amount due to *Knight*, but he is only entitled to be paid rateably.

NORTH, J.:—

The first question is, whether the rules bind every member of the society. In my opinion, they do. Rule 18 of the original rules provides, "That any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings, be entitled to receive back the net amount of monthly subscriptions paid in." This is part of the contract entered into between the member and the society, that he is to be entitled to receive back the specified amount on giving the stipulated notice. Then the rule goes on, "That if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice." Pausing there for a moment, it seems to me that this settles the matter, not only as between each member and the society, but, through the society, as between the different members who come in upon the footing of these rules; and, as between two members who give notices of withdrawal at different times, each is by virtue of his contract with the society to come in according to the order of date of his notice, and one member would have priority over another according to the dates of their notices by reason of the common contract which each of

(1) 12 App. Cas. 197.

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them has made with the society on the footing of the rules. But the rule goes on, "Provided always that the widows and children of deceased members shall have the precedence." If these latter words were not in the rule it would be exactly like the rule in the *Sunderland Case* (1); and I cannot see any substantial distinction between it and the rule of the *Blackburn* society which was the subject of the decision of the House of Lords in *Walton* v. *Edge* (2). Do these words make any difference? In my opinion, they do not produce any effect, except that they might make the actual payment to a member who had given notice of withdrawal rather later than it would otherwise be in case the widow and children of a deceased member were entitled to receive payment at a time when there was only a limited fund available for making the payments. Then, looking at the amended rules, I do not see that there is, in this respect, any substantial distinction between them and the old rules. Rule 21 of the new rules provides that: "Any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings, and leaving his pass-book at the chief office, be entitled to withdraw the amount standing to his credit in the books of the society." That, in my opinion, is in substance just the same as the old rule. I do not think that such a formal alteration as requiring the leaving of the pass-book alters the meaning of the rule. "If more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice: Provided always, that the widows and children of deceased members, when entitled, shall have the precedence. The directors, however, shall not be required to pay more than one applicant for withdrawal at any one monthly meeting, and in all cases of the withdrawal of shares, subscriptions in arrear, and all fines incurred previous to any such application, shall be deducted from the amount which the member shall be entitled to receive." That, again, is like the old rule. The directors are not compelled to pay more than one withdrawing member at any one monthly meeting; but there is no reason to suppose that

(1) 24 Q. B. D. 394. (2) 10 App. Cas. 33.

they would not be glad to do it, if they had funds available for the purpose. But this is one of those minor matters which go to the time at which members who are entitled to receive payment will actually get paid, and it does not touch any question of principle, or affect the right of withdrawing members to be repaid, and to be paid *inter se* according to priority of notice.

The next point raised was this: That, if there is a priority under the rules according to the dates of the notices, that priority continues only while the society is a going concern. It has been held by the House of Lords, in *Walton* v. *Edge* (1), that there may be some priority even after a winding-up order. But I am not considering that now. I am only considering whether the priority ceases at an earlier date than the winding-up of the society, or, in the present case, the date of the instrument of dissolution. The *Sunderland Case* (2) was relied on, in which the point was raised whether the society had become known to be substantially insolvent at an earlier date than the winding-up order. There were ten societies, and their books were, in 1886, investigated by some accountants. The accountants' report shewed that eight of the ten societies, including the *Thirty-sixth* and the *Thirty-second*, were insolvent. On the 14th of February, 1887, this report was submitted to an aggregate meeting of the shareholders of all the societies, and a resolution was then passed recommending the appointment of a general committee, consisting of the directors and two delegates from each society, to consider the affairs of all the societies. The meetings of the *Thirty-second* and the *Thirty-sixth* societies were respectively held on the 16th and 17th of February, and at those meetings it was decided to appoint delegates, according to the resolution of the aggregate meeting, and to send to each shareholder a copy of the report. The report shewed, as regards the *Thirty-sixth Society*, a deficiency of upwards of £14,000, and, as regards the *Thirty-second Society*, a deficiency certainly of upwards of £3000, and possibly of upwards of £7000. As regards the *Thirty-sixth Society*, nothing further was done after the 17th of February. As regards the *Thirty-second Society*, some further dealings took place. On the 17th of June, resolutions

(1) 10 App. Cas. 33. (2) 24 Q. B. D. 394.

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were passed for the voluntary winding up of both societies. The County Court Judge considered that there was a difference between the two societies, and that the *Thirty-sixth Society* was declared to be insolvent on the 17th of February; but that the *Thirty-second Society* was not declared to be insolvent until the 3rd of May, 1887. The Divisional Court held that there was no such difference; but that on the 17th February, as regards the *Thirty-sixth Society*, and it may be on the 16th February, as regards the *Thirty-second Society*, an entirely new state of things was created. The Court considered that this state of things had so altered the position of the societies, and had brought about so nearly their probable suspension, that the rights of withdrawing members ought to determine, not merely at the date of the winding-up, but at the time at which the report was actually made known to the shareholders. The judgment of the Court, pronounced by Mr. Justice *Mathew*, was this (1): "We are of opinion that this rule" (that is, the rule as to withdrawing members) "was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to shew that before the times at which two of the notices were given, and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shewn from the scheme of reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it

(1) 24 Q. B. D. 403.

appears to us, no longer exists." Then he referred to the case of *Brownlie* v. *Russell* (1), and said: "As appears from the judgment of the Lord Chancellor, a winding-up order takes away the right, because 'it necessarily puts a close to the whole concern, terminates at the date the account of each shareholder, and cuts off all chance of profit which, if the thing had gone on, both classes of members might have had.' But all these consequences were as clear and inevitable in the cases of these societies when the report of the accountant was published in February, 1887, as if a winding-up order had then been actually made." This shews that the Court considered the actual report of the accountants, or its publication on the 16th or 17th of February, as the turning-point, to which these various expressions—the necessity of suspending business, the fact, or the belief in the fact, that the society was insolvent, the notoriety of the fact that the society could not meet its liabilities—all referred. Those phrases, if used in their general meaning, afford tests which it would be very difficult indeed to apply; tests, in fact, not altogether consistent; but, as applied to the particular matter before the Court, viz., the report and resolution of February, those expressions are quite clear and intelligible. Then the learned Judge goes on: "The case of *Walton* v. *Edge* (2) was relied upon by the learned counsel for the appellants, as an authority for the proposition that members who gave effective notice before the date of the winding-up order were entitled to priority in payment to those members who had not given notice. But the question in that case was as to the rights of members 'who gave notice not only before the winding-up, but when there was no information that any winding-up was going to take place, and when nothing special was alleged to affect them with notice that the society was not to continue as a going concern.' The view we take is in accordance with the valuable judgment of Lord *Shand* in the case of *Carrick* v. *North British Building Society* (3). It is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case as this puts an end to the right to withdraw."

(1) 8 App. Cas. 235. (2) 10 App. Cas. 33.
(3) 22 Scottish Law Reporter, 833.

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The ground, therefore, of the decision in that case is perfectly clear. And, following that case entirely, I have to inquire whether such a state of things, as it was there held would put an end to the right to withdraw, existed in the present case. Can it be said here, to adopt Lord *Selborne's* words in *Walton* v. *Edge* (1), that there was any information that a winding-up was going to take place, or anything special to affect the members with notice that the society was not to continue as a going concern? Or, to take Mr. Justice *Mathew's* words, was there here any "state of things which, to the knowledge of all concerned, renders liquidation inevitable"? My answer to those questions is, No. It is necessary to look at the position of the company. The statement of claim, which has been treated as a sufficient statement of the facts, says: "That early in the year 1889 the auditors of the society discovered or suspected that the then secretary had been guilty of irregularities in the discharge of his duties, and had thereby caused the society considerable losses. Notice of these losses was given to the members in June or July, 1889." "On the 30th of July, 1889, at an adjourned general meeting of the society, it was unanimously resolved, that it was desirable that the nominal share of £12 be reduced to £10 per share. The object of this reduction was to meet the above losses, and the affairs of the society have ever since been conducted on the footing of this reduction. On the 12th of February, 1890, at a special general meeting, the rules were duly altered and such reduction was duly sanctioned."

It is not necessary to go further than that date. What was the condition of things at that time? The report of the accountant was issued to the members in July, 1889. We know that early in 1889 suspicions had arisen. In June or July, 1889, the facts were ascertained and were communicated to the members. Looking at the book which contains notices to withdraw, I find that most of the notices were given before the facts had been ascertained. Throughout the year 1888, there were four or five or six notices a month; in May I think there were rather more. Then when we get to 1889, I find that in January there were two notices, in February one, and in March one, and

(1) 10 App. Cas. 33.

then, for some reason which I do not know (some information had, I suppose, leaked out), in April notices to withdraw were given by eight-and-twenty members. Then in May there were only seven notices, in June six, and in July two.

The report was dated on the 26th of July, and it was issued to the members a day or two afterwards. It is a full report by the accountant who had examined the books. He said: "My investigation has extended over a period of eight years, defalcations having been discovered as far back as the early part of 1881. I have already explained to you verbally, at the meeting held on the 18th of June last, the methods adopted by the late secretary in the perpetration of the frauds against your society." (After that explanation at the public meeting there were very few notices of withdrawal.) "Apart from the question of fraud, the books of the society have been kept in a careless and unbusinesslike manner. The item 'Reserve Fund,' which has been appearing in your printed accounts, is misleading. It represents a fund, formerly invested, part in Consols and part with another building society, but withdrawn in September, 1887, the society lending the amount to itself at 4 per cent. interest, and using it for ordinary business purposes. The gross deficiency, as far as can be ascertained, inclusive of loss of property on hand, is over £7000. The amount the society has now to make provision for is that shewn in the balance-sheet, viz., £5239 1*s.* 1*d.*" The balance-sheet is then set out as down to the 28th of February, 1889, and it shews that the assets are, roughly, £43,000 as against liabilities £48,000, so that the loss sustained was really only a small percentage of the figures mentioned in the balance-sheet. There is no suggestion in that report, and no contemplation, of a winding-up, of the impossibility of carrying on the business, or even of a state of insolvency or anything near it. On the contrary, the report suggests a temporary loss which can be made good out of dividends. There is not a suggestion even that the society cannot go on. It is taken for granted that it will go on, and the report says that "under the circumstances probably the best course for the society to adopt would be to take the necessary steps to reduce the capital." Why? "Otherwise the payment of dividends until the capital is again intact

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might probably give rise to difficulty." Therefore they contemplate the society going on, with a nominal reduction of its capital, for the purpose of continuing the distribution of dividends. Therefore it is to be a dividend-earning society. "There is no reason why the society should not, with careful, judicious, and economical management, have a good future before it, and, if the shareholders approve, a sinking fund could be created for the purpose of making good the loss now suffered to those of the present shareholders who maintain their connection with the society. . . . The rules of the society might with advantage be revised."

That, I think, is a very cheerful report. The winding-up or suspension of the society, the impossibility of carrying on its business, is the very last thing in contemplation. I do not think it was in contemplation at all. What they did contemplate was, the making of dividends in the future, and the best means of enabling the society to distribute those dividends. There was to be a fresh start, a revision of the rules—not an abandonment of the society. This report was published to the shareholders at the end of July; the result was that on the 6th of August there was one withdrawal, in the month of September two, and no others during the remainder of that year. In 1890 there was one withdrawal in January, two in February, including that of *Knight*, and two in April. Therefore, in the opinion of the members, as shewn by their acts, so far from there being any depression, or panic, or consternation produced by this discovery, there was nothing of the kind. The report says they are to go on and to provide for the losses, even to make up the capital which had been abstracted. The effect produced upon the shareholders' minds, so far as their notices to withdraw indicate, is clearly shewn by the fact that such notices practically ceased after the publication of the report. The result is, that I can find nothing whatever, prior to the instrument of dissolution, to indicate such a state of things as would put an end to the operation of the existing rules upon the principles laid down in the cases to which I have referred. I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that all the notices to

withdraw are good down to that time, subject to this, that with regard to Mr. *Yates* the cases seem to shew that, in order that a notice should be good, it must be completed by the expiration of the period fixed before the date at which the line is to be drawn. In the present case a month's notice is required, and Mr. *Yates'* notice had not been running for a month prior to the date of the deed of dissolution. Therefore, he is not entitled to any priority by reason of his notice, but all the other parties are.

Mr. *Knight* seems to be in a very fortunate position, and how he contrived to get there I do not understand; but there is an existing award in his favour, and in my opinion he is entitled to the full benefit of it. The award is based upon the footing of his being a withdrawing member of the society, and that I cannot get out of. The award finds that a sum of £1236 is due from the society to him, and he is entitled to receive that sum.

By the terms of the rules the award is binding upon the society, and, in my opinion, it is also binding upon every member of the society. It would be impossible to say that an award made in a dispute between a member and the society ceases to be binding upon its members when a winding-up takes place. It has been duly arrived at during the life of the society, and is, in my opinion, binding for all purposes.

A claim was made by the Defendant *Knight* for dividends, but it has not been persisted in; if it had, it would have been necessary for me to express an independent opinion, how far on that point, which is not covered by the award, Mr. *Knight* would be bound. Having regard to the cases which have been uniformly decided since Mr. *Knight's* case was before the Divisional Court, I confess I do not see how there can be any doubt about the conclusion as to that too. The opinion expressed by Lord *Cairns* in *Doman's Case* (1) is very important, and is one of the earliest on the point, and, in addition to the case before Mr. Justice *Chitty*—*Pepe* v. *City and Suburban Permanent Building Society* (2) —there is a very recent case before Mr. Justice *Kekewich*: *Bradbury* v. *Wild* (3).

(1) 3 Ch. D. 21. (2) [1893] 2 Ch. 311.
(3) [1893] 1 Ch. 377.

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Another point raised by Mr. *Macoun* was, that all the persons who had given notice to withdraw before the alteration of the rules had in some way waived their notices by assenting to the alteration. I do not think they have done so. The two sets of rules were said to be two separate contracts; but it is a fallacy to suppose that there was any new contract. The contract between the member and the society is to be found in the rules and regulations for the time being in force, and whether the phrase "for the time being" is or is not used, seems to me immaterial. The rules and regulations for the time being establish the existing relations between the members and the society. Although the particular arrangements between them may vary from year to year, if the contract is that they shall vary from year to year, there are not two contracts, but one contract. In my opinion, therefore, it is impossible to say that any existing priority was lost by reason of the alteration in the rules.

Sir *Arthur Watson*:—

Mr. *Knight*, although he will get his £1236, will be paid in his turn.

NORTH, J.:—

Yes; he has no priority.

The order as settled by the Registrar contained a declaration that the trusts of the instrument of dissolution ought to be performed and carried into execution, and the Court did order the same accordingly. And the Court did also declare that the several members of the society (other than *Knight*) who had given notices of withdrawal, which notices had matured prior to the 11th of November, 1892, were entitled to be paid the amounts due to them respectively in accordance with the existing rules of the society, and that they and also the Defendant *Knight* (under his notice of withdrawal given on the 26th of February, 1890) were entitled to be paid the amounts so due to them respectively according to the priority of the giving and maturity of their respective notices of withdrawal. But this declaration was to be without prejudice to any question between the widow and children of a deceased member and any other

member who had given notice of withdrawal maturing at the same time as to priority *inter se.*

And, the Defendant *Knight* by his counsel waiving any claim to dividend, the Court did also declare that the Defendant was entitled to be paid the sum of £1236 in accordance with the award.

Accounts and inquiries were then directed, and the further consideration of the action was adjourned, with liberty to apply.

Solicitors: *A. Hammond; J. R. Pakeman; W. M. Willcocks; J. B. Edwards; Hatchett-Jones & Co.*

W. L. C.

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## DAVIS *v.* DAVIS.

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Dec. 8, 9, 19.

[1893 D. 997.]

*Partnership—Receipt of Share of Profits—Business carried on Jointly—Implied Agreement for Partnership—Land employed in Business—Conversion—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *ss.* 1, 2, 20.

Under the *Partnership Act,* 1890, just as before that Act, though the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, this is not to be regarded as a presumption which has to be rebutted by other circumstances; but all the circumstances must be considered, and an inference drawn from them as a whole, without attributing undue weight to any one of them.

Partners in a business borrowed money on the security of freehold premises of which they were tenants in common, and expended the money in adding a part of those premises to adjoining workshops in which the business was carried on and of which the partners were co-owners:—

*Held,* that sect. 20, sub-sect. 3 of the *Partnership Act,* 1890, applied, and that the addition to the workshops did not become partnership property so as upon the death of one of the partners to descend as personalty.

SPECIAL CASE for the opinion of the Court, stated by consent, pursuant to the Rules of the Supreme Court, Order XXXIV., rule 4.

The case contained the following statements:—

1. *Edward Davis,* by his will, dated the 12th of February, 1887, after appointing executors and making divers pecuniary and specific devises and bequests in favour of his wife and

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children, gave, devised, and bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, unto his two sons *G. T. Davis* (the Plaintiff), and *C. F. Davis*, their heirs, executors, administrators and assigns, absolutely, in equal shares as tenants in common.

2. The testator died on the 9th of January, 1889.

3. The testator's residuary estate comprised (*inter alia*): (*a*) Two freehold houses and premises, respectively Nos. 62 & 64, *Sumner Street, Southwark*, which at the time of his death were in his occupation; (*b*) an adjoining freehold house and premises, No. 60, *Sumner Street*, let to a yearly tenant at a rent of £30 per annum; (*c*) the goodwill, stock-in-trade, plant and machinery of the business of a patent fan manufacturer, which the testator carried on at the date of his death on the premises Nos. 62 & 64, *Sumner Street*.

4. The business had been carried on by the testator on the last-named premises from the time when he acquired those premises by purchase about fourteen years prior to his death. For many years previously to his acquiring those premises he had carried on the business, either in partnership or alone, elsewhere in *Sumner Street*. The business was always carried on under the style of *Lloyd & Davis*. There was no special advantage in carrying on the business at Nos. 62 & 64, *Sumner Street*. It might have been carried on with equal advantage elsewhere.

5. From the death of the testator until the death of *C. F. Davis* the Plaintiff and *C. F. Davis* carried on the business for their own benefit under the style of *Lloyd & Davis*, and on the same premises, which was advantageous in keeping together the connection. "No articles of partnership were ever executed, nor any agreement for a partnership come to, nor was a partnership ever mentioned between the Plaintiff and *C. F. Davis*. No accounts as between the Plaintiff and *C. F. Davis* were ever kept, nor was any balance-sheet or annual account as to the business prepared, but every week, and occasionally oftener, the Plaintiff and *C. F. Davis* each drew from the business and retained for his own use £3 or more, each one so drawing and retaining the same sum precisely as the other, and, save as aforesaid, no division of profits or other moneys was made."

6. In October, 1889, the Plaintiff and *C. F. Davis* borrowed a sum of £300 on mortgage of the house and premises, No. 60, *Sumner Street*, and they expended the same in enlarging their workshops at Nos. 62 and 64, *Sumner Street*, by taking in, so as to form part of those workshops, a shed situate in the rear of and forming part of the premises No. 60, *Sumner Street*. The rent of the tenant of No. 60, *Sumner Street*, was thereupon reduced from £30 to £24 per annum.

In September, 1891, the Plaintiff and *C. F. Davis* borrowed a further sum of £300 on an equitable mortgage of the premises Nos. 62 and 64, *Sumner Street*, and that sum was used in the business, mainly in the purchase of new plant and machinery.

No entries were made by the Plaintiff and *C. F. Davis* as to any rent or otherwise howsoever in respect of any of the said freehold premises. The rent of No. 60, *Sumner Street*, was, from time to time as it was received, divided equally between the Plaintiff and *C. F. Davis*.

On the death of the testator, the Plaintiff and *C. F. Davis* respectively paid succession duty on the share in the said freehold premises so devised to him.

*C. F. Davis* died on the 29th of January, 1892, intestate, and without issue, leaving the Plaintiff his heir-at-law, the Defendant *Emily Maria Louisa Davis* (his widow), and the Plaintiff and his sister, the Defendant *Sarah Frost*, his sole next of kin. Administration to the estate and effects of *C. F. Davis* was granted to the Defendant *Emily Maria Louisa Davis* on the 5th of April, 1893. Any interest coming to the Defendant *Sarah Frost* was for her separate use.

The questions submitted for the opinion of the Court were:—(1.) Whether any partnership existed between the Plaintiff and *C. F. Davis* in respect of the business? (2.) If there was such a partnership, then whether the freehold premises Nos. 62 and 64, *Sumner Street*, and so much of the premises No. 60, *Sumner Street*, as, since the year 1889, had been used for the business, or any part or parts thereof, or interest therein respectively, formed part of the assets of the partnership? (3.) Whether the moiety of the same premises which belonged to *C. F. Davis* passed on his death, beneficially as well as legally, to the Plaintiff as his

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heir-at-law, subject to any rights therein of the Defendant *Emily Maria Louisa Davis* to dower or under the *Intestates' Estates Act*, 1890.

*T. L. Wilkinson*, for the Plaintiff:—

The principle deducible from such cases as *Badeley* v. *Consolidated Bank* (1), *Cox* v. *Hickman* (2), *Waterer* v. *Waterer* (3), and *Davies* v. *Games* (4), is that, in order to constitute a partnership, there must be either an express agreement or facts from which the Court can infer an agreement for a partnership. The facts as stated in the special case lead to the conclusion that there was no agreement for a partnership, and no intention that there should be one.

At any rate the real estate was not converted, and it devolved as real estate: *In re Wilson* (5).

*Ashton Cross*, for the Defendants:—

From the conduct of the parties, as stated in the case, the Court will infer that there was a partnership, and that the freehold estate formed part of the assets of the partnership: *Davies* v. *Games; Waterer* v. *Waterer.*

*Wilkinson*, in reply:—

In face of the statement in paragraph 5 of the case, that no agreement for a partnership was ever come to, it is impossible to infer that there was a partnership.

NORTH, J. (after reading the special case, continued):—

The statement contained in paragraph 5 of the case, that "no agreement for a partnership was ever come to between the Plaintiff and *C. F. Davis*" was relied upon by Mr. *Wilkinson.* He said, and I think correctly, that there must be some agreement for a partnership in order to constitute a partnership. I think that is clear on general principles, and there are phrases in the *Partnership Act*, 1890, tending to the same conclusion.

(1) 38 Ch. D. 238.
(2) 8 H. L. C. 268.
(3) Law Rep. 15 Eq. 402.
(4) 12 Ch. D. 813.
(5) [1893] 2 Ch. 340.

But I do not think that statement ought to be construed so literally as Mr. *Wilkinson* sought to construe it. I understand it to mean that no agreement for a partnership was come to, except so far as the facts stated in the case are evidence that there was a partnership existing between the two. If I did not so construe paragraph 5, I could not deal with the special case at all, because it would be clear that, although the parties had agreed upon a special case, they attached different meanings to the phrases used in it.

The testator's will contains a devise and bequest of all the rest and residue of the testator's estate and effects unto his two sons, in equal shares as tenants in common. Besides other property which is not mentioned in the case, the sons took this business as tenants in common, and they also took these three houses in *Sumner Street* as tenants in common. At that time there was no partnership existing between them, and the property vesting in them as tenants in common did not in itself constitute a partnership; and the question is, whether anything took place afterwards which had the effect of constituting a partnership.

As regards the business, there is, I think, sufficient to shew that there was a partnership. In the first place, sect. 1 of the *Partnership Act*, 1890, provides that "partnership is the relation which subsists between persons carrying on a business in common with a view of profit." That exactly describes the present case. I do not say that that is of itself conclusive, but it comes precisely within the definition therein given of a partnership. The special case admits that profits were divided, because the £3 a week or more which was drawn out by each brother weekly was really a division of profits, and the case states that "save as aforesaid, no division of profits or other moneys was made." Whether that £3 a week was or was not entirely profit, at any rate it is clear that it was in part a division of profits. Then sub-sects. 1 and 3 of sect. 2 of the *Partnership Act*, 1890, seem to me material. By sub-sect. 1: "Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof." Sub-sect. 3 is material, as bearing

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upon the question of partnership in the business, because I have come to the conclusion, for reasons which I will mention presently, that there was a partnership in the business, though the real estate was not brought into the partnership.

To deal first with the business itself. Sub-sect. 3 of sect. 2 of the Act is, "The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business." Now, that is exactly what took place here. Each of these brothers did receive at their regular drawings money derived, to some extent at any rate, from the profits of the business. Then sub-sect. 3 goes on: "But the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business." We have, then, a statement in the Act that the receipt of a share of the profits of a business is *primâ facie* evidence of a partnership, but that the receipt of such a share does not of itself make the receiver a partner in the business. These phrases appear somewhat conflicting, but I do not think there is any real difficulty in understanding them, because the matter was clearly explained by the Court of Appeal in *Badeley* v. *Consolidated Bank* (1). It is true that that case was decided before the Act of 1890 was passed, but the Act seems to me to give effect to what was there laid down. In *Badeley* v. *Consolidated Bank* (2) there are some observations in the judgment of Lord Justice *Cotton* which are directly in point. But I will read what Lord Justice *Lindley* said (3): "I take it that it is quite plain now, ever since *Cox* v. *Hickman* (4), that what we have to get at is the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another. It may be, and probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, *primâ facie* those two are partners, or *primâ facie* the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and I think is true even now; but, when you have a great deal more to consider, it appears

(1) 38 Ch. D. 238.
(2) Ibid. 250.
(3) 38 Ch. D. 258.
(4) 8 H. L. C. 268.

to me to be a fallacy to say that you are to proceed upon the idea that sharing profits *primâ facie* creates a partnership or an agency, and that *primâ facie* presumption has to be rebutted by something else. I cannot help thinking that Sir *Montague Smith* was quite correct when he dealt with that mode of reasoning in the case of *Mollwo, March & Co.* v. *Court of Wards* (1). He says this: 'It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.' Now, it appears to me, having read the judgment of Mr. Justice *Stirling* with great attention, that he has inadvertently fallen into that erroneous method of reasoning. He has laid stress on the fact that *Smith* and *Badeley* participated in profits, and has treated that circumstance as *primâ facie* evidence of partnership which had to be rebutted by other evidence, instead of taking the whole of the documents and the whole of the evidence and drawing such inferences as he thought right from the whole."

Adopting then the rule of law which was laid down before the Act, and which seems to me to be precisely what is intended by sect. 2, sub-sect. 3, of the Act, the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in it, and, if the matter stops there, it is evidence upon which the Court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole. In the present case I cannot treat the receipt of a share of the profits alone as

(1) Law Rep. 4 P. C. 433.

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*primâ facie* evidence of a partnership if there are other circumstances to be considered side by side with it. But I cannot find any other circumstances which conflict with it. Therefore, I think that this sub-section applies, and that the receipt of a share of profits is *primâ facie* evidence of a partnership in the business from which the profits were derived. But I go further, for there are certain circumstances which not only, in my opinion, do not conflict with, but, so far as they indicate anything, are in favour of that view.

In the first place, each partner drew precisely the same sum, generally weekly, but sometimes oftener. The sum drawn was usually £3 by each, sometimes it was more; but when the one drew more than £3 the other also drew more. From these facts I come to the conclusion that there must have been some agreement as to the mode in which the two brothers were to draw out money. It is impossible to believe that the necessities of the two were always so exactly equal that each required precisely the same sum per week that the other did. I come, therefore, to the conclusion that the equality of their drawings arose from some agreement between them that the drawings out of the profits should always be exactly equal.

There is another thing which ought not to be ignored, although I do not wish to attach too much weight to it. It is clear, and it has not been disputed, that the business was carried on by the two brothers in such a way as to make them liable as partners to outsiders. Of course it does not follow that, because two persons carry on business in such a way as to render them liable as partners to outsiders, it is the necessary consequence that they are partners *inter se*, but the circumstances may be such as to shew that they were. For instance, a published statement that they were partners would be strong evidence that they were so for all purposes. In my opinion, a statement by conduct comes to precisely the same thing if you arrive, from their conduct, at the conclusion that they have held themselves out to the world as partners. That was clearly so here, and I think it is some evidence of an agreement for a partnership. I do not wish to attach too much weight to it, but I think, in the absence of anything to the contrary, the fact that the two brothers were

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partners to some extent is some evidence that they were partners altogether.

Again, they borrowed money on mortgage upon two occasions, and put it mainly, at any rate, into the business. The special case shews that there were joint mortgages by the two, and each of them would be liable for the mortgage money. It is not stated that each brother mortgaged his own interest to secure the mortgage money, but that "the Plaintiff and *C. F. Davis* borrowed £300" on the first occasion, and a similar statement is made as to the second borrowing. I infer from that that they were joint mortgagors, jointly liable for the debt, and that each was chargeable with the whole. Therefore I find that they jointly borrow money, for which they become jointly liable, and that they put the money so borrowed into the business which they carry on together. I think that is an indication of some weight that a partnership existed between them. I come, therefore, to the conclusion upon the Act, assisted by these various circumstances which I have mentioned, that the two brothers were partners as regards the business.

As regards the land, I have come to a contrary conclusion. It is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards that property. That conclusion is indeed expressly negatived by sub-sect. 1 of sect. 2 of the Act of 1890, and there are many cases before the Act to the same effect. There is the well-known case of *Fromont* v. *Coupland* (1), in which two persons horsed a coach, and shared the profits derived from running it, and were held to be partners, though they were not partners in the horses by which the work was done. Take, again, the well-known case of ships owned in common. Again, there is the case of *Steward* v. *Blakeway* (2) in which land belonging to co-owners as tenants in common was used for the purpose of carrying on a quarrying business, but that of itself was not considered sufficient to make the co-owners partners in the land. In fact, sub-sect. 1 of sect. 2 of the Act seems to me conclusive, unless there is something else in the case, that the two were not partners in the land. The land was

(1) 2 Bing. 170. (2) Law Rep. 4 Ch. 603.

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vested in them as tenants in common, each, that is to say, being owner of an undivided moiety; and if the land became partnership property, the question would arise when and how it became so, and there is no evidence that anything was done by agreement to make the land partnership property, and the facts to which I have referred as supporting the view that there was a partnership in the business do not apply to the land.

The case of *Morris* v. *Barrett* (1) was in some respects not unlike the present case. In that case the residue of real and personal estates was devised by a testator to his two sons, as joint tenants, and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other; it was held, under the circumstances, that they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates. That is not unlike the present case, and it is worth noticing for this reason, that there the partnership in the business was admitted; and although the two sons were partners for twenty years in carrying on the business, and the business was carried on under circumstances singularly like those of the present case, yet it was held that this did not constitute any partnership in the land.

There are, no doubt, cases in which land has been considered to have been brought into a partnership by reason of the nature of the business. In *Waterer* v. *Waterer* (2) two persons were partners in business as nursery gardeners. Lord Justice *James*, in giving judgment, said (3): "I am of opinion that this case is governed by that class of cases in which Lord *Eldon* said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether

(1) 3 Y. & J. 384. (2) Law Rep. 15 Eq. 402.
(3) Law Rep. 15 Eq. 406.

by descent or devise, if in fact it was substantially involved in the business. . . . A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes which could not be carried on without it. It is, in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs, from the trees and shrubs themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate." Then *Davies* v. *Games* (1) was cited—a case in which the business carried on was that of farmers. There three brothers, tenants in common of a farm and lands in *Wales* carried on a farming business together. One brother died, having devised his one-third share to a nephew, and he and the surviving brothers, *B.* and *W.*, continued to carry on the farming business. The nephew sold his one-third share of the farm and lands to his uncles, *B.* and *W.*, the conveyance being to them as joint tenants, and they continued to carry on the farming business. *B.* died, having given all his property to his wife. The farm and lands were subsequently sold. *W.* claimed, as surviving joint tenant, the proceeds of sale, representing the one-third share purchased from the nephew, and it was held by Vice-Chancellor *Hall* "that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that *W.* was entitled to only a moiety of the proceeds of sale." *Waterer* v. *Waterer* (2) was cited, and it seems to me that the case proceeded upon precisely the same principle. In the course of his judgment, Vice-Chancellor *Hall* referred to what Lord *Eldon* said in *Ripley* v. *Waterworth* (3), and what Lord Justice *James* said in *Waterer* v. *Waterer*, and said that he considered it applicable to the case before him, viz., "that the one-third share became involved in partnership dealings, and must be regarded as partnership property."

(1) 12 Ch. D. 813, 817. (2) Law Rep. 15 Eq. 402.
(3) 7 Ves. 425.

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I have looked at many other cases bearing upon this point, and I have found several other instances in which lands have been held to be, to use the words of Lord Justice *James*, "involved in partnership dealings," and therefore regarded as partnership property. The well-known case of *Darby* v. *Darby* (1) is one of them. There, two persons purchased land on a joint speculation with their joint moneys, for the purpose of laying it out in building plots, and re-selling it at their joint profit or loss, and it was held that the land was the very essence of the thing to be dealt with, and was, therefore, converted out and out. In *Re Hulton* (2), a solicitor and another person entered into a similar land speculation. There was a good deal of evidence in that case, and the view which I took was, that there was not enough to shew that the land was partnership property, but the Court of Appeal held that there was. It was a complicated case; and it is not worth while referring to the details, but it is an illustration of the principle.

In my opinion, the mere fact that the two houses, which according to the special case, were not more fitted than any others for the carrying on of the business, were used for it, did not make them involved in the partnership dealings in such a way as to become partnership property. As regards the mortgages, it must be borne in mind that they stand on exactly the same footing: one comprised houses which were used for the partnership business and the other comprised a house and land which were not used for partnership purposes at all. Therefore, I do not think the mortgages throw any light upon the matter. The only remaining fact is, that, during the continuance of the partnership between the brothers, they used part of the premises, No. 60, for partnership purposes. They began for the first time to use No. 60, *Sumner Street*, for the partnership purposes in October, 1889, and they spent some money in adapting it to their purposes, and that money was the joint money of the two brothers. But, in my opinion, that is not enough to indicate that there was a partnership in the land. If the money which they expended in adapting this additional piece of land had been spent in buying it, instead of improving it, it is clear that it

(1) 3 Drew. 495. (2) 62 L. T. (N.S.) 200.

would not have become partnership property; because, in that case, it would have been hit exactly by sub-sect. 3 of sect. 20 of the *Partnership Act*, which says: "Where co-owners of an estate or interest in any land, . . . not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of any agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase." In the present case, the money which was borrowed was not employed in paying for the additional piece of land which was brought into the business; if it had been the case it would have been exactly within that sub-section; but the case seems to me so like that, that, although it is not literally covered by the sub-section, the same law applies to it.

Under the circumstances, I come to the conclusion that there was a partnership in the business, but that none of the houses Nos. 60, 62, and 64, *Sumner Street*, were partnership property.

Solicitors: *Harry Pearse; A. Hammond.*

W. L. C.

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## COXEN *v.* ROWLAND.

[1893 C. 1718.]

*Power—General Power of Appointment—Exercise by Will—Death of Appointee before Testator—Devolution of Appointed Property.*

A testatrix having, under a deed of settlement, a general power of appointment over certain real estate, gave all the real and personal estate which she might be possessed of or entitled to, or of which by virtue of any power or authority she was competent to dispose, "in manner following"; and then, after making certain specific devises and bequests in which she treated the subjects of her gifts as her own, she gave the property forming the subject of the power to her husband, and also made him her residuary legatee. Throughout her will she drew no distinction between property which belonged to her and property over which she had only a power of disposition. Her husband predeceased her:—

*Held*, that she had indicated her intention that the power should be exercised, and that the property subject to it should be deemed hers for all purposes; and, consequently, that it went to her heirs, and not as in default of appointment under the settlement.

### SPECIAL CASE.

By an indenture dated the 20th of December, 1865, a freehold messuage, described as No. 35, *Stokes Croft*, in the city of *Bristol*, was conveyed to *William Rice* and his heirs, to such uses, upon such trusts, and in such manner as *Eliza Jones*, the wife of *Richard Jones*, should, notwithstanding coverture, by deed or will appoint, and, in default thereof, to the use of the said *William Rice* and his heirs during the life of the said *Eliza Jones*, upon trust for her and after her decease, and such default of appointment as aforesaid, to the use of the said *Richard Jones*, his heirs and assigns for ever.

*Richard Jones*, by his will dated the 27th of January, 1887, devised a certain yearly fee-farm rent payable out of the messuage, No. 35, *Stokes Croft*, and certain furniture and other articles therein, unto his wife *Eliza Jones* absolutely; and he gave the residue of his estate and effects, real and personal, to the said *William Rice*, upon trust for sale and for payment out of the proceeds of sale of his debts and legacies, and to deal with the ultimate proceeds as thereby provided.

*Richard Jones* died on the 1st of March, 1887. The Plaintiffs were the present trustees of his will.

*Eliza Jones*, by her will dated the 21st of December, 1885, gave, devised, and bequeathed all the real and personal estate and effects, whatsoever and wheresoever, which she might be possessed of or entitled to, or which by virtue of any power or authority, by any deed or will, or of any separate use or right of property she was competent to dispose of in manner following: She then gave certain charitable and other pecuniary legacies, and made certain specific bequests and devises, in which she described the subjects of the gifts in this way: "My diamond ring," "my gold watch," "my gold watch-chain, with guinea attached," "my messuage and premises situate and being No. 11, *Hillgrove Hill*," "my five shares in the *Bristol Waterworks Company*," "my messuage and premises No. 6, *Montague Street*."

The will then continued: "I give and devise my messuage and premises formerly known as No. 18, but now known as No. 35, *Stokes Croft, Bristol*, to my said husband *Richard Jones* absolutely." And then, after giving certain fee farm rents, which she spoke of as "my several yearly fee-farm rents," the will continued: "And as to all the residue and remainder of my estate and effects, whatsoever and wheresoever (real and personal), after payment of all my just debts, funeral and testamentary expenses, I give, devise, and bequeath the same unto my said husband *Richard Jones* absolutely"; and she appointed her husband *Richard Jones*, *William Rice*, and *John Cornwall* to be executors of her will.

*Eliza Jones* died on the 1st of June, 1888, and her will was proved on the 5th of July, 1888.

The Defendants were her co-heirs-at-law. The question for the determination of the Court was whether, in the events which had happened, the house No. 35, *Stokes Croft, Bristol*, passed to the Plaintiffs under the will of *Richard Jones*, or devolved upon the Defendants as the co-heirs of *Eliza Jones*.

*Vernon R. Smith*, for the Plaintiffs:—

According to the true construction of the will, the testatrix meant to exercise the power for the benefit of the appointee

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only; she has not shewn any intention of making the appointed property her own for all purposes. The object of the appointment having failed, the property must go as in default of appointment under the ultimate limitation of the deed of the 20th of December, 1865, and accordingly it passed by the will of *Richard Jones* to the Plaintiffs.

The limitation in the will of the testatrix is legal and not equitable, so that there is no question of resulting trust.

[He referred to the following authorities: *In re Davies' Trusts* (1); *In re Van Hagan* (2); *In re Ickeringill's Estate* (3); *Willoughby-Osborne* v. *Holyoake* (4).]

*Dunham*, for the Defendants:—

The intention of the testatrix was to take the property out of the instrument of December, 1865, for all purposes and to make it her own; and upon the question of intention it is immaterial whether the property dealt with is real or personal, or whether the limitation is legal or equitable.

In *Willoughby-Osborne* v. *Holyoake* there was a simple appointment to an individual which failed to take effect, and that case is in my favour.

The testatrix has, throughout her will, drawn no distinction between property which was her own and property over which she had only a power of disposition, and her intention to make the appointed property her own for all purposes is clear: *In re Pinède's Settlement* (5); *Brickenden* v. *Williams* (6). In *In re Thurston* (7), the testatrix by her will dealt only with the property forming the subject of the power, and appointed the sole trustee of the property to be her executor. That case affords an illustration of what would not be a sufficient indication of an intention to take the property out of the instrument creating the power. There are no such circumstances here.

*Vernon R. Smith*, in reply:—

In the absence of an effectual appointment *Richard Jones'* estate

(1) Law Rep. 13 Eq. 163.
(2) 16 Ch. D. 18.
(3) 17 Ch. D. 151.
(4) 22 Ch. D. 238.
(5) 12 Ch. D. 667.
(6) Law Rep. 7 Eq. 310.
(7) 32 Ch. D. 508.

cannot be displaced. A gift in favour of the testatrix's heir-at-law on failure of the gift to *Richard Jones* cannot be read into the will. This is real estate, and the testatrix has not made it her own in the same way as if it had been personalty over which she had a power which she had exercised by appointing it to her executors.

1893. Dec. 2. STIRLING, J. (after stating the facts, continued):—

The question I have to consider is whether the real estate conveyed by the deed of the 20th of December, 1865, passed by the will of *Richard Jones*, or devolved upon the Defendants as the co-heirs of *Eliza Jones*.

Unless the will of *Eliza Jones* operates as an appointment in favour of the Defendants, it seems to me that the title of the Plaintiffs who claim under *Richard Jones* must prevail; and the real question is whether the will of *Eliza Jones* does so operate.

The rule applicable is thus stated by the Vice-Chancellor of *Ireland* in *Re De Lusi's Trusts* (1), in a passage cited with approbation by Sir *George Jessel* in *In re Pinède's Settlement* (2), and by Mr. Justice *Fry* in *Willoughby-Osborne* v. *Holyoake* (3). The Vice-Chancellor says (4): "The question in all cases of the class of that now before me is one of intention—namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument containing the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed." Where an appointment is made by will under a general power to a trustee in favour of a person who dies in the lifetime of the testator, the case of *In re Van Hagan* (5) shews that the question becomes one of resulting trust, whether the appointed property is real or personal. Here, the appointment contained in the will of *Eliza Jones* is made directly to the beneficiaries without the intervention of any trustee, and, consequently, that case affords but little guidance in the decision of the present. It is, however, established by the decisions in *In re Pinède's Settlement, In re*

(1) 3 L. R. Ir. 232.
(2) 12 Ch. D. 667, 672.
(3) 22 Ch. D. 238, 239.
(4) 3 L. R. Ir. 237.
(5) 16 Ch. D. 18.

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*Ickeringill's Estate* (1), and *Willoughby-Osborne* v. *Holyoake* (2), that the rule laid down in *Re De Lusi's Trusts* (3) may apply although the appointment is not in the first instance to a trustee. An appointment may be valid although not in terms made in favour of any individual. If a testator were to make a will in such words as these, "I hereby declare my intention to exercise all general powers of appointment vested in me, and my meaning is that all real and personal property subject to such powers shall go and devolve as if it were vested in me at the time of my death," and the will contained nothing more, I take it that this would be a sufficient exercise of the powers, and that the Court would, as regards personalty, treat the will as an appointment to the testator's legal personal representatives, and, as regards realty, to his heirs-at-law. Having regard to what was laid down by the Court of Appeal in *In re Van Hagan* (4), I conceive that no distinction can be drawn in this respect between a will dealing with real estate and one dealing with personal estate; and this appears to have been the opinion of Vice-Chancellor *Hall* in *In re Ickeringill's Estate* (5) and of Mr. Justice *Fry* in *Willoughby-Osborne* v. *Holyoake* (6). It was suggested in argument that the latter case was one where an appointment was made to trustees; but, although there are four reports of the decision (7), and in the report in the *Law Journal* the material parts of the will are set out *verbatim*, I cannot discover any ground for such a contention. It is not, of course, necessary that the testator should express himself in the precise terms which I have mentioned; it is enough if the Court finds an intention that the power shall be exercised and that the property shall be treated as if it belonged to the testator himself. This I understand to be laid down by Mr. Justice *Fry* at the conclusion of his judgment in the case of *Willoughby-Osborne* v. *Holyoake*; and I may add, that the reasoning of the learned Judge was independent of the decision in *In re Van Hagan*. He was dealing with the case of *Hoare* v. *Osborne* (8), in which Vice-Chancellor *Kindersley* held

(1) 17 Ch. D. 151.
(2) 22 Ch. D. 238.
(3) 3 L. R. Ir. 232.
(4) 16 Ch. D. 18.
(5) 17 Ch. D. 156.
(6) 22 Ch. D. 239.
(7) 22 Ch. D. 238; 52 L. J. (Ch.) 331; 31 W. R. 236; 48 L. T. (N.S.) 152.
(8) 33 L. J. (Ch.) 586.

that a married woman could not make property her own by appointing it by her will in exercise of a power. He says this (1): "It appears to me that the sound conclusion from a will of that description is this: that the appointment shall operate, but it shall operate as if the property had been her own. In that manner I give effect to both the expressed intentions, viz., the expression of intention that it shall be disposed of, and the expression of intention that it shall be treated as if it were her own. I therefore think that where, as in the present will, I find a declaration that the property is to be deemed hers, and a declaration of intention to exercise her power of appointment, there is nothing to prevent the property being appointed as if it were her own."

In the present case the testatrix begins: "I give, devise, and bequeath all the real chattels, real and personal estate and effects, whatsoever and wheresoever, of which I may be possessed or entitled to, or which by virtue of any power or authority, by any deed or will, or of any separate use or right of property, I am competent to dispose of in manner following." There is thus an intention plainly expressed of exercising all powers vested in the testatrix. She proceeds to give pecuniary legacies and to make specific devises and bequests. In disposing of specific property she treats it always as her own. Thus, she bequeaths "my gold watch." She devises "my messuage and premises situate and being No. 11, *Hillgrove Hill*," to her sister. She makes a specific bequest of "my five shares in the *Bristol Waterworks Company*." She devises "my messuage and premises No. 6, *Montague Street*." Then she devises as follows: "I give and devise my messuage and premises formerly known as No. 18, but now known as No. 35, *Stokes Croft, Bristol*, to my said husband *Richard Jones* absolutely." Then after other specific gifts, the subjects of which are spoken of as belonging to the testatrix, the will proceeds: "And as to all the residue and remainder of my estate and effects, whatsoever and wheresoever (real and personal), after payment of all my just debts, funeral and testamentary expenses, I give, devise, and bequeath the same unto my said husband *Richard Jones* absolutely." And she

(1) 22 Ch. D. 241.

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appointed her husband, *William Rice*, and *John Cornwall* executors. It thus appears that throughout the will she draws no distinction between property which belonged to her and property over which she had only a power of disposition: all such property is alike spoken of as belonging to the testatrix. If the final residuary gift had been in favour of some person other than her husband, the house No. 35, *Stokes Croft*, would, as it seems to me, have passed under it, and been subject to the payment of the testatrix's debts and funeral and testamentary expenses. Under the words, "the residue and remainder of my estate and effects, whatsoever and wheresoever (real and personal)," I think the testatrix plainly meant to include both property which belonged to her and property over which she had merely a power of disposition. The residue of both kinds of property was to be treated as one and as belonging to her. I think that under these circumstances she has indicated (not less clearly than did the testators in the three cases of *In re Pinède's Settlement* (1), *In re Ickeringill's Estate* (2), and *Willoughby-Osborne* v. *Holyoake* (3)) her intention that the power should be exercised, and that the property which is subject to it should be deemed hers. In my opinion, therefore, the question must be answered in favour of the Defendants.

Solicitors: *Meredith, Roberts, & Mills*, agents for *Broad & Francis, Bristol; George Reader & Co.*, agents for *David Johnstone, Bristol.*

(1) 12 Ch. D. 667. (2) 17 Ch. D. 151.
(3) 22 Ch. D. 238.

G. A. S.

## TAYLOR *v.* ROE.

STIRLING, J.

1893

*Dec.* 5, 13

[1882 T. 2489.]

*Costs—Taxation—Interlocutory Order directing Payment of Costs—Non-payment—Interest as from Date of Order—Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *ss.* 17, 18, 20—*Rules of Supreme Court,* 1883, *Order* XLII., *rr.* 14, 16.

An interlocutory order directing the payment of costs by one person to another comes within sect. 18 of the *Judgments Act,* 1838, and carries interest on the costs thereby awarded as from the date of such order.

THIS was a summons taken out by the Plaintiff to review the decision of the Taxing Master, and raising the question whether the Plaintiff was entitled to interest on the certified amount of the costs payable by the Defendant to him under certain interlocutory orders made in the action.

The action was brought for an account of certain paintings and drawings sold by the Defendant as agent for the Plaintiff.

The material facts as appearing from the Plaintiff's objections to the taxation, and the Taxing Master's answers thereto, were as follows:—

Under an order of the 22nd of August, 1884, a writ of attachment was, upon motion by the Plaintiff, ordered to issue against the Defendant for non-compliance with a previous order (not the judgment in the action) directing further and better accounts, and the Defendant was ordered to pay to the Plaintiff his costs of the motion and attachment. These costs were taxed and certified on the 23rd of December, 1884, at £35.

Under another order dated the 18th of December, 1884, upon motion by the Plaintiff, a receiver was appointed of certain paintings, &c., and the Defendant was ordered to pay to the Plaintiff his costs of the motion. These costs were taxed and certified on the 24th of April, 1885, at £29 12*s.* 8*d.* A writ of *fieri facias* was issued at the instance of the Plaintiff to obtain payment of these costs, but without success.

Under orders of the 21st of May, 1885, and the 3rd of June, 1885, certain other costs were payable by the Defendant to the Plaintiff, but they had only then been brought in for taxation.

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Under an order of the 20th of January, 1893, the Plaintiff had to pay to the Defendant the costs of another, but unsuccessful, motion, and by an order dated the 27th of January, 1893, it was ordered that in taxing the costs of the Defendant under the order of the 20th of January, 1893, directed to be paid by the Plaintiff to the Defendant, the Taxing Master should have regard to the £35 taxed costs certified in his certificate of taxation, dated the 23rd of December, 1884, and to the £29 12*s.* 8*d.* taxed costs certified in his certificate dated the 24th of April, 1885, and to the costs to be taxed under the orders dated the 21st of May, 1885, and the 3rd of June, 1885 (all which costs were directed to be paid by the Defendant to the Plaintiff), and any interest properly payable in respect thereof, and should set off the same and certify the balance due from the Plaintiff to the Defendant, or from the Defendant to the Plaintiff as the case might be, and in case such balance was certified to be due to the Plaintiff, then the Plaintiff was to be at liberty to issue a writ or writs of sequestration against the Defendant for the same.

The Plaintiff claimed interest on the £35 and £29 12*s.* 8*d.* certified costs, as from the dates of the orders under which those costs were taxed. The Taxing Master disallowed the claim. It was admitted that the order did not determine the question, but left it to be decided upon taxation. The Taxing Master in his answers to the objections stated as follows: "The Plaintiff relies on 1 & 2 Vict. c. 110, ss. 17 and 18 (1), and Order XLII. of the Rules of the Supreme Court, 1883, r. 16. The Act has been in operation for more than half a century, but

(1) The Act 1 & 2 Vict. c. 110 is as follows: "Sect. 17. And be it enacted, that every judgment debt shall carry interest at the rate of £4 per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

"Sect. 18. And be it enacted, that all decrees and orders of Courts of Equity . . . . whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act. . . . "

I am not referred to, nor have I been able to find, an authority for the proposition that costs such as these carry interest, nor is there any practice to support the claim to interest. I do not read Order XLII., r. 16, as giving a right to interest where independently of the rule interest could not be claimed, so I do not think the rule helps the Plaintiff."

Then, after referring to and distinguishing certain cases, he stated as follows: "In this absence of authority in the Plaintiff's favour, upon what must be a question of daily occurrence, and in view of the settled practice to the contrary, I am unable to take upon myself to allow interest on these interlocutory costs, and so I overrule the objections."

*Fossett Lock*, for the summons:—

The Taxing Master ought to have allowed interest upon these costs as from the date of the orders by which payment was directed: 1 & 2 Vict. c. 110, ss. 17, 18.

Under that Act it was the practice of the Courts of Common Law to allow interest from the date of entering up the judgment; the Chancery Courts, on the other hand, only allowed it from the date of the Taxing Master's certificate.

That, however, is now altered, and interest on costs in all cases runs from the date of the judgment: Order XLII., rules 14, 16, of the Rules of Supreme Court, 1883, and Forms, Appendix H; *Boswell* v. *Coaks* (1); *Pyman* v. *Burt* (2). In the Act 1 & 2 Vict. c. 110, no distinction is drawn between final and interlocutory orders. Such a distinction has, no doubt, been drawn in cases under the *Bankruptcy Act*, 1883; but, in the absence of any such distinction in the original Act, those cases are not material: *Ex parte Moore* (3); *Ex parte Alexander* (4); *In re Riddell* (5). There does not appear to be any authority in which the question of interest on costs of an interlocutory order has been raised. The reason for such absence of authority may be that formerly the costs of such orders were directed to be taxed at once, the practice of keeping the taxation open until final order being

(1) 57 L. J. (Ch.) 101; 36 W. R. 65.
(2) W. N. (1884) 100.
(3) 14 Q. B. D. 627.
(4) [1892] 1 Q. B. 216.
(5) 20 Q. B. D. 318, 512.

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of recent growth. In *In re Bird's Estate* (1), and *Eardley* v. *Knight* (2), which appear to be against my contention, *Boswell* v. *Coaks* (3) was not cited.

[He also cited *In re London Wharfing and Warehousing Company* (4); *Attorney-General* v. *Nethercote* (5); *Ex parte Hasluck* (6); *West* v. *West* (7); *Tolson* v. *Dykes* (8); and *Doe* v. *Hampson* (9).]

*Hastings*, Q.C., and *F. Cripps-Day*, for the Defendant:—

Interlocutory orders are not judgments at all within the Act, which plainly refers to final judgments only: *Gibbs* v. *Pike* (10); *Jones* v. *Williams* (11); *Garner* v. *Briggs* (12); *Ex parte Dale* (13); *Financial Corporation* v. *Lawrence* (14). There is nothing to shew that the practice, adopted by the Chancery Taxing Masters, of not allowing interest upon the costs of interlocutory orders, is wrong.

*Fossett Lock*, in reply.

STIRLING, J.:—

This case comes before me upon the application of the Plaintiff, who has carried before the Taxing Master certain objections to the taxation, which the Taxing Master has overruled.

The facts are concisely stated in the Taxing Master's answers to the Plaintiff's objections. [His Lordship then stated the facts as above set out, observing, with reference to the sum of costs which had been taxed and certified, that writs of *fi. fa.* had been issued for the purpose of obtaining payment of them, but unsuccessfully, and continued:—]

The question is whether the Taxing Master has come to the right conclusion. Previously to the Act 1 & 2 Vict. c. 110, a judgment debt did not carry interest: this was expressly decided in *Gaunt* v. *Taylor* (15), where the then state of the law is fully

(1) W. N. (1889) 182.
(2) 41 Ch. D. 537.
(3) 57 L. J. (Ch.) 101; 36 W. R. 65.
(4) 53 L. T. (N.S.) 112.
(5) 11 Sim. 529.
(6) 62 L. T. (N.S.) 941.
(7) 17 L. R. Ir. 49.
(8) 1 Ph. 439.
(9) 4 C. B. 745.
(10) 8 M. & W. 223.
(11) Ibid. 349.
(12) 27 L. J. (Ch.) 483; 6 W. R. 378.
(13) [1893] 1 Q. B. 199.
(14) Law Rep. 4 C. P. 731.
(15) 3 My. & K. 302.

explained. In that state of things the statute to which I have just referred was passed. [His Lordship read sects. 17, 18, and 20 of that Act, and observed that by sect. 123 the time for the commencement of the Act was, except where otherwise provided, the 1st of October, 1838; and he continued:—]

Now, looking in the first place simply at the language of the Act, we find that it provides, *inter alia*, that "all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, . . . . whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law." Any order, therefore, which comes within that definition has the effect of a judgment, and the debt carries interest, under sect. 17, at 4 per cent.

It is not every order of a Court of Equity, however, which has that effect: it must be an order for the payment of money, or costs, or charges, or expenses, and it must order payment to some person. The decisions upon the Act have followed those lines. For example, a decree in Chancery which contained a declaration that a Defendant was liable to make good to an estate being administered in another suit a specific sum, but did not order payment of that sum by the Defendant, was held not to fall within 1 & 2 Vict. c. 110, s. 18: *Garner* v. *Briggs* (1). Again, an order for payment into Court, not to a person, does not fall within the section: *Ward* v. *Shakeshaft* (2); nor does an order for payment of costs out of a fund in Court: see *Attorney-General* v. *Nethercote* (3). On the other hand, in *Duke of Beaufort* v. *Phillips* (4), a decree for specific performance, ordering the Defendant to pay purchase-money, interest, and taxed costs, was held to constitute a judgment debt. In *Jones* v. *Williams* (5) it was held that the section did not apply to money awarded by an arbitrator, when the agreement for reference had been made a rule of Court. Baron *Parke*, in giving judgment (6), says this: "It seems to me, that according to the proper construction of

(1) 27 L. J. (Ch.) 483; 6 W. R. 378.
(2) 1 Dr. & Sm. 269.
(3) 11 Sim. 529.
(4) 1 De G. & Sm. 321.
(5) 8 M. & W. 349.
(6) 8 M. & W. 358.

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the Act, it does not apply to any costs, charges, or expenses, except those which are ordered *by the Court* to be paid, and that it does not embrace cases in which something is necessary to be done in order to give the party a title to the money, but includes those only in which the obligation to pay the money appears on the face of the judgment, decree, or order. But then it is argued, that where the Court orders the payment of *costs*, something must be done in order to ascertain their amount before execution can issue. No doubt that is so; but then costs are not liable to the same observation as *money*, as they stand upon a peculiar footing. When the Legislature mentions 'money, costs, charges, and expenses,' it means money decreed or ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officer of the Court. That point, indeed, it is unnecessary to decide; but I am of opinion, that with respect to costs, it is enough if they are ascertained by the officer of the Court, and that it is not necessary that there should be any order to pay after they are taxed by the officer." And Baron *Alderson* says (1): "With regard to the costs, charges, and expenses, it seems to me that they may be ascertained by the officer of the Court, though not specifically mentioned in the rule of Court. All that is required is, that if the Court shall order a sum of money to be paid, and if it also order costs, that means the costs ascertained by the officer of the Court. Independently of the words of the Act, which especially refer to costs, charges, and expenses, it seems to me that the Court may very well put such a construction upon the Act as to include costs, where there is an order for the payment of a specific sum." That is an express decision that, where money and costs are ordered to be paid it is not necessary that there should be a further order to pay the costs after taxation. It was contended that this did not apply where costs alone were ordered to be paid without any money; but the language of the statute is plain. It extends to orders "whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person." It has long been settled that a judgment for costs only carries interest: *Pitcher* v. *Roberts* (2); *Newton* v. *Conyngham* (3); and

(1) 8 M. & W. 359. (2) 12 L. J. (Q.B.) 178. (3) 17 L. J. (C.P.) 288.

it appears to have been the opinion of the Court of Common Pleas in *Hodgson* v. *Patterson* (1) that a rule ordering a party to pay the taxed costs of the day was within 1 & 2 Vict. c. 110, s. 18. Upon the construction of the Act, I think that an order directing payment of costs, to be taxed, by one person to another person, is within the section. This view appears to me to have been adopted and acted upon both by those who framed the rules of the old Court of Chancery and by the officers of that Court.

I have already referred to sect. 20 of the Act, which provides for the issue of new and altered writs for giving effect to the provisions of the statute in such form as the Judges of the several Courts of Law and Equity should from time to time think fit to order. The writs framed by the Judges of the Court of Chancery are to be found set out in 1 *Beavan's* Reports (2). I need not say that the Judges by whom those writs were sanctioned—Lord *Cottenham*, Lord *Langdale*, and Vice-Chancellor *Shadwell*—knew the distinction between a decree and an order, and knew that orders were made by the Court of Chancery on interlocutory proceedings directing the payment of costs by one person to another. Amongst the forms is a form of a writ of *fi. fa.*, on a decree or order for payment of costs, and this form gives interest from the date of the Taxing Master's certificate. The form of the writ, which is addressed to the sheriff, is as follows: "We command you that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made the sum of £—— for certain costs which were lately before us in our High Court of Chancery, in a certain cause, or certain causes (*as the case may be*), wherein *A. B.* is plaintiff and *C. D.* is defendant, or in a certain matter there depending, intituled . . . . by a decree or order (*as the case may be*) of our said Court, bearing date the —— day of ——, decreed or ordered (*as the case may be*), to be paid by the said *C. D.* to *A. B.*, and which costs have been taxed and allowed by *G. H.*, Esq., one of the Masters of our said Court at the said sum of £——, as appears by the certificate of the said Master, dated the —— day of ——. And that of the goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made interest on the said sum of £—— at the rate of £4 per

(1) 5 Scott, N. R. 76. (2) Pages xii., *et seq.*

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cent. per annum from the —— day of ——." Then there is a note which says: "The date of the Master's certificate, or, if that were prior to the 1st October, 1838, say 'from the 1st day of October, 1838.'"

From this reference to the 1st of October, 1838, it is obvious that the writ of *fi. fa.* providing for the payment of interest must have been made with reference to the Act.

This form was retained by the Consolidated Orders: see *Morgan's* Chancery Orders (1). I have had the advantage of consulting a very experienced officer of the Court (Mr. *Stringer* of the Central Office), who was formerly in the office of Records and Writs of the Court of Chancery, and he informs me that according to the practice of that office no distinction as regards the issue of writs of *fi. fa.* for costs was drawn between final decrees and interlocutory orders. All that was regarded in that office was whether there was an order for payment of costs by a person to a person.

Under the *Common Law Procedure Act*, 1852, writs of *fi. fa.* have been issued upon a rule for payment of costs only, and provide for interest in the same way as the Chancery writs: see Rules made in Hilary Term, 1853, 1 *Ellis & Blackburn's* Reports (2), and *Day's* Common Law Procedure Act (3). Since the Rules of 1883 interest has run, in the absence of special directions, not from the date of the certificate, but from the date of the order: see *Pyman* v. *Burt* (4); *Boswell* v. *Coaks* (5). In all other respects the practice remains the same. The practice of the Office of Records and Writs and of the Central Office seems to me to be in favour of the Plaintiff. The Taxing Master, whom I have seen, informs me that there is no practice to the contrary in the Taxing Office; and that all that he meant to convey by his answers to objections was that neither he nor any of his colleagues was aware of any case in which interest had been allowed in that office on costs awarded by an interlocutory order. The absence of precedent may, as it seems to me, be readily accounted for when it is remembered that costs payable out of a

(1) 3rd Ed. p. 608.
(2) App. I. p. xxxvi.
(3) 4th Ed. pp. 413, 468.
(4) W. N. (1884) 100.
(5) 57 L. J. (Ch.) 101; 36 W. R. 65.

fund do not carry interest, and that in other cases the duties of a Taxing Master generally come to an end when his certificate is given. The cases of *Ex parte Moore* (1), *Ex parte Alexander* (2), and *In re Riddell* (3) were referred to. These, however, merely relate to the question what is a "final judgment" within the meaning of the *Bankruptcy Act*, 1883, s. 4, sub-s. 1 (*g*); and, regard being had to the decisions, it may very well be that neither of the orders with which I have to deal is a final judgment such as would support an adjudication in bankruptcy. In sect. 18 of 1 & 2 Vict. c. 110, there is nothing about final judgment. I think that each of the orders, being an order for payment of costs by the Defendant to the Plaintiff, falls within sect. 18 of 1 & 2 Vict. c. 110, and entitles the Plaintiff to interest on the costs thereby awarded as claimed; and, consequently, that the Plaintiff's objections to the taxation must be allowed.

Solicitors: *Hurford & Taylor; Morse Hewitt & Farman.*

G. A. S.

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## WINTER *v.* WINTER.

STIRLING, J.
1893
*Nov.* 24; *Dec.* 15.

[1893 W. 1427.]

*Practice—Writ—Service out of Jurisdiction—Action for Execution of Trusts of Settlement—No Property within Jurisdiction—Rules of the Supreme Court*, 1883, *Order* XI., *r.* 1.

In order to bring a case within Order XI., rule 1 (*d*), which provides for service out of the jurisdiction of the writ in an action for the execution of the trusts of a written instrument of which the person to be served is a trustee, there must be, at the time when leave to effect such service is asked for, property subject to the trusts of the instrument actually situate within the jurisdiction, and not merely property which ought to be, or, if the trusts were duly executed, would be, so situate.

On an application to set aside service in such an action on the ground that when leave to serve out of the jurisdiction was obtained there was no property within the jurisdiction:—

*Semble*, the service may possibly be held good if it be shown that property has subsequently come within the jurisdiction.

# MOTION.

On the 1st of May, 1893, the Plaintiffs obtained an order

(1) 14 Q. B. D. 627. (2) [1892] 1 Q. B. 216.
(3) 20 Q. B. D. 512.

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giving them liberty to issue the writ in this action for service out of the jurisdiction.

The Plaintiffs claimed to be beneficially entitled to a sum of Consols under the trusts of a settlement dated in March, 1886, and executed in *England*, and of which the Defendant was sole trustee. The action was for the administration of the trusts of the settlement. Previously to the 1st of May, 1893, the Defendant had sold the Consols comprised in the settlement and had left *England*; and there was not at that time, nor had there at any time since been any property subject to the trusts of the settlement situate within the jurisdiction, nor could the settlement itself or any copy of it be found.

This was a motion on behalf of the Defendant asking that the order of the 1st of May, 1893, might be discharged, and that the writ and all subsequent proceedings in the action might be set aside on the ground that, having regard to the provisions of Order XI., rule 1 (1), the Court had no jurisdiction to allow such service.

*Hastings*, Q.C., and *C. T. Mitchell*, for the motion:—

There is no property subject to the settlement within the jurisdiction, and the order for service on the Defendant was improperly obtained and ought to be discharged.

*S. Dickinson*, for the Plaintiffs:—

The settled property, being a sum of Consols, is situate within the jurisdiction, and the case therefore falls within sub-rule (*d*). But if not, it is at any rate within sub-rule (*e*), inasmuch as a breach of trust which for this purpose is equivalent to a breach of contract, has been committed within the jurisdiction.

(1) Order XI., rule 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever .... (*d*) the action is for the .... execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of *England*; or (*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in *Scotland* or *Ireland*."

*Hastings*, in reply.

1893. Dec. 15. STIRLING, J.:—

This case comes on upon a motion to set aside the service of a writ out of the jurisdiction and to discharge the order authorizing such service.

The service cannot be supported unless it is brought within the latter part of Order XI., rule 1 (*d*); that is, unless the action be "for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of *England*." The words "as to property situate within the jurisdiction" appear to be intended to limit the generality of the rule, and to impose a condition which must be fulfilled in order that service out of the jurisdiction may properly be allowed. The property referred to is, according to the natural meaning of the language, property subject to the trusts of the written instrument. Further, I think it is property which is actually situate within the jurisdiction, and not simply property which ought to be, or if the trusts were duly executed would be, so situate.

The rule does not in terms define the period at which the property is to be situate within the jurisdiction; but, seeing that the rule relates to service, and that the language with which I am dealing imposes a condition on the fulfilment of which the propriety of the service depends, I think the period to be regarded must be when leave to effect service is given, though if property were found within the jurisdiction when service was actually effected, or, at the latest, when such an application as the present is made, the Court may possibly take that circumstance into consideration. For the present purpose it is not necessary to inquire further: there was not at the time when leave to serve out of the jurisdiction was obtained, nor has there been since, any property situate within the jurisdiction subject to the trusts of the settlement mentioned in the writ and statement of claim. The motion, therefore, succeeds. It may be right to add, that although for the purpose of obtaining leave to serve out of the jurisdiction the existence of some property within

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the jurisdiction must be shewn, I do not think that it follows that other property which subsequently comes within the jurisdiction cannot be dealt with in the course of the same action if once properly commenced, or that it would be necessary to issue a fresh writ for the purpose of executing the trusts as to such property.

Solicitors: *Wilkins, Blyth, Dutton, & Hartley; Hickin, Smith, & Capel-Cure.*

G. A. S.

## FIELD *v.* FIELD.

KEKEWICH, J.

1893 Dec. 1.

[1893 F. 1812.]

*Trustees—Investment—Mortgage—Building Estate—Title-deeds—Custody—Convertible Securities—Solicitor.*

Where a trust fund had been invested on a mortgage of a building estate, the development of which would involve frequent reference to the title-deeds, the trustees were held justified in depositing the deeds with their solicitor, instead of retaining them under their own exclusive joint control in a bank or elsewhere.

*Semble*, convertible securities, such as bonds payable to bearer, belonging to a trust, ought not as a general rule to be left in the custody of a solicitor or agent.

THE Plaintiff, *Joshua Field*, was, under the will of his late mother, entitled as tenant for life of a trust fund of £9900, which, in 1876, was invested in the names of the Defendants, the two trustees of the will, on a mortgage by the Plaintiff himself of a building estate at *Balham*, of which he was the freeholder. In 1890 the Plaintiff entered into an agreement with a builder for developing and building upon the estate, and had already granted building leases of certain portions. The Plaintiff's solicitors had originally been Messrs. *Hopgoods & Dowson*, of 17, *Whitehall Place*, who for thirty years past had had the custody of his title-deeds. In 1893 the Plaintiff changed his solicitor, but the title-deeds and securities still remained in the custody of Messrs. *Hopgoods & Dowson*, as solicitors to the trustees, who insisted that the counterparts of the building leases should also be deposited in the same custody. The Plaintiff, however, objected to any of the deeds remaining in the custody of any firm of solicitors or in any other than the trustees' custody, or that of their bankers; and he now moved for an injunction to restrain the Defendants, as trustees of the will, from permitting the deeds to remain in the hands or custody of their solicitors, or, unless the deeds were deposited by the Defendants at a bank in their joint names, from permitting the same to remain in the possession or custody of any person or persons other than the Defendants or one of them. There was not the slightest suggestion

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that Messrs. *Hopgoods & Dowson* were not perfectly trustworthy custodians in every respect; but the question was really raised as one of principle, whether trustees could, consistently with their duty to the trust estate, deposit their title-deeds with their solicitor.

From the evidence it appeared that the deeds were kept by Messrs. *Hopgoods & Dowson*, on behalf of the Defendants, the trustees and mortgagees, in a separate box in a burglar-and-fire-proof strong-room in the basement of their offices, 17, *Whitehall Place*. As to the general practice in such cases, an affidavit by four eminent *London* solicitors was filed on behalf of the Defendants, stating as follows: "It is a common and convenient practice for trustees to deposit title-deeds relating to their trust estate with their solicitors for safe custody. Most of the leading solicitors in *London* have strong-rooms for the express purpose of keeping their clients' deeds therein, and we never heard it suggested that a trustee was acting improperly in allowing title-deeds relating to his trust to remain for safe custody with his solicitors. Although title-deeds are frequently, when the client is desirous, deposited in a box with a banker for safe custody, it is found in practice to be an inconvenient arrangement where reference to such deeds may be required, because bankers will not allow the title-deeds in their custody to be inspected except upon the authority of all the persons in whose names they are deposited, which at times it is difficult to obtain at the moment; and, moreover, clients generally require some assistance from their solicitor, in reading a deed, for the purpose of understanding it, which they cannot get at the bank unless they take their solicitor with them. It is also more convenient and less expensive to clients for solicitors to be able to refer to title-deeds at their own offices, when it is requisite to do so, than to have to attend at a specified time at a banker's to inspect them at an inconvenient place. It is also highly inconvenient, and often impossible at the moment, for a solicitor in large practice to leave his offices and personally attend with his client at a banker's to inspect deeds."

It appeared that, of the two trustees, one resided in *Suffolk* and the other in *Surrey*.

*Warmington*, Q.C., and *H. Terrell*, for the Plaintiff:—

We submit that the rule and practice, as recognised by the Court, in such cases as this, are not in accordance with the statement made in the affidavit of the four eminent solicitors. It is, *primâ facie*, a breach of duty on the part of trustees to allow solicitors to be custodians of their deeds: they must themselves be the custodians. In *In re Dewar* (1) Mr. Justice *Kay* assumed it as clear law that trustees should not place their securities with solicitors. They are bound to keep their deeds in such a place, and in such a manner, as that one of their body cannot get at them without the consent of the rest. The usual practice, and apparently the safest, is to deposit the deeds in a bank in the joint names of the trustees. Here the trustees have entrusted the deeds to their solicitors against the express wish of the tenant for life, who is entitled to have a voice in the selection of a custodian of the deeds.

*Renshaw*, Q.C., and *Ingpen*, for the Defendants:—

If, as is suggested, trustees ought to deposit their title-deeds in a bank, it is difficult to see how the business of the country could go on, for it would be impossible to look at a single document without all the trustees being brought up, probably from different parts of the country, for the purpose. Even a bank is not a perfectly safe place in which to keep deeds, for they are still liable to be dealt with improperly, as in *Giblin* v. *McMullen* (2), where they were made away with by the bank cashier. The decision in *In re Dewar* does not go so far as to say that a trustee is *ipso facto* liable because he has left his muniments of title in the custody of his solicitor. If so, it would be impossible—and certainly most inconvenient—for trustees to carry on their trust, particularly where frequent reference to the deeds is necessary, as must be the case here, where the trust property consists of a building estate in course of development. The Court will not change a custody the trustees themselves are satisfied with, especially where, as in the present case, the solicitors have had the custody of the deeds for the last thirty years: some special reason for requiring the change must

(1) 33 W. R. 497. (2) Law Rep. 2 P. C. 317.

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be shewn. This is not a case in which the wishes of the tenant for life should be regarded, since he is himself the mortgagor, and therefore cannot dictate to the mortgagees, the trustees, in what custody the mortgage securities should be placed. We do not say that convertible trust securities, such as bonds payable to bearer, ought to be deposited by trustees with their solicitors: that, we admit, would be clearly improper.

*Warmington*, in reply:—

*Giblin* v. *McMullen* (1) concerned the liability, not of trustees, but of a bank—the question being whether the bank was liable for the improper conduct of their servant. The question really is, What is the duty of trustees as regards their title-deeds? I submit that what the Court requires is that it shall be impossible for any one to get at the deeds without the joint action of all the trustees. If, in the present case, the custody had been for a temporary and special purpose, there might have been no objection; but this is a case of permanent custody.

KEKEWICH, J.:—

This motion raises a question of practical importance, and one of extreme interest to solicitors, and still more to those numerous clients of theirs who are trustees. My first inclination was to say that a question of such a vast importance must be carefully considered, and that it would not be right to express an opinion upon it until after consideration, and in language carefully weighed; but further discussion has convinced me that I ought to dispose of this motion, not as dealing with an abstract question, but rather with reference to the circumstances of this particular case, instead of laying down any general rule. I have before me an affidavit of four gentlemen with regard to the convenience of the deposit of trust deeds with solicitors and the practice of the profession. These four gentlemen stand high in the profession, and it would be difficult to find four others better qualified to depose as to the practice and the convenience of business; but they and the notice of motion alike seem to me to evade what, to my mind, is the real point. A comparison has

(1) Law Rep. 2 P. C. 317.

been made between the deposit of deeds in a solicitor's office and the deposit of them in a bank. The question is not whether the trust deeds may be conveniently deposited in a solicitor's office, or in a bank, or anywhere else, but whether the deeds ought to be under the personal control of the trustees. If solicitors are prepared to make in their own office, or elsewhere, arrangements for depositing trust deeds, so that they may be under the control of trustees, I cannot myself see that this is open to any objection, and the suggestion as to keeping the deeds at a bank has not much to do with the case, and only introduces confusion.

The general principle, in my opinion, is that trustees must have their muniments of title, as well as their securities, under their own control. I have held in one case some time ago, *Webb* v. *Jonas* (1), that this was enough to prevent trustees investing on a contributory first mortgage, because trustees investing on any particular mortgage security are bound to have the trust money and the security in their own names, and if the money and the security are in the names of others they are not fulfilling that obligation. The same thing applies to documents and deeds in their possession. They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away. But to that obligation there must be reasonable limits. In order to realize the trust estate, the deeds must be in the custody of the solicitor to the trustees. He has to make abstracts of them, to make an examination of the deeds abstracted, and, if the property is sold in lots, the purchasers must have the opportunity of examining the deeds with the abstracts, if they wish, and even a second and a third examination may be necessary before completion. It would be a monstrous thing to say that the trustees have to keep the deeds all that time in a box with perhaps three or four keys, so that if any purchaser wishes to consult the deeds all the trustees will have to attend in person. That strikes one immediately as shewing that reasonable limits to the trustees' obligation should be applied.

In the present case I have the trustees of a will, having their trust fund invested on mortgage. It happens that the tenant for life under the settlement is the mortgagor, but that is

(1) 39 Ch. D. 660.

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immaterial for the present purpose. The mortgaged property is a building estate in course of development; we all know what that is. From time to time building agreements have to be prepared and leases granted, and the deeds have to be consulted in order to see, for instance, that the parcels are all right, or that the powers have been properly observed, or that the boundaries of a plot in a second intended lease do not overlap the boundaries in the first, and so forth. It is practically impossible to deal with such questions unless the solicitor to the trustees has the deeds. On the other hand, there is possible danger in that course. Rules are made not only for the guidance of solicitors who are honest, as in the overwhelming majority of instances they are, but also with reference to dishonest solicitors, of whom, unfortunately, there are some. It is extremely difficult to lay down any general rule, and to say where any general rule may be departed from. In my opinion it comes to this—that the solicitor may do what is reasonable and may advise the trustees as to what is reasonable. If there is a trust shut up for years, as often happens, and there is nothing in it to be done, I do not see why the deeds should not be locked up in a box in a bank or a safe deposit, and the trustees keep the keys, and that is the proper course to pursue. If, on the other hand, they are wanted from time to time, I do not think the trustees are acting unreasonably in giving their solicitor power to do what is right and necessary for the despatch of business. If the particular business comes to an end and there is no further occasion to refer to the deeds, then they can be put into a safe place. I am now referring to title-deeds only. With regard to bonds and certificates payable to bearer, I have not the slightest doubt that they ought not to be under the control of a solicitor, or any other agent. The trustees are responsible for them, and they must keep them, not necessarily in their own custody, but in some place where they cannot be got at without the consent of the whole body.

I am not prepared to make any order on the motion; but the matter has been fairly argued, and therefore I make no order, except that the costs of the motion are to be costs in the action.

Solicitors: *J. Leslie Field; Hopgoods & Dowson.*

G. I. F. C.

# STRETTON'S DERBY BREWERY COMPANY *v.* MAYOR OF DERBY.

ROMER, J.
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*Oct.* 31;
*Nov.* 1, 2, 23.

[1892 S. 3225.]

*Nuisance—Local Government—Sewer becoming Insufficient by Increase of Drainage—Damage by Flooding—Urban Sanitary Authority—Liability to Action—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 21, 299.

In 1855 a municipal corporation made a sewer under a road within their district. Many years afterwards the owners of premises abutting on the road erected a brewery, and, in pursuance of sect. 21 of the *Public Health Act*, 1875, or the corresponding section of the *Sanitary Act*, 1866, connected the drainage of the brewery cellars with the sewers.

In 1891, 1892, and 1893, the cellars were damaged by floodings.

The floodings arose from the fact that by reason of the large increase in recent years in the number of buildings draining into the sewer, when very heavy falls of rain occurred, the sewer was too small to carry off the influx of water, and the pressure forced the contents of the sewer through the connections into the cellars.

The system of drainage originally adopted reasonably provided for the district and for the then probable increase of buildings which would have to drain into it.

There had been no negligence in constructing or maintaining the sewer, or in not providing a new sewer or sewage system:—

*Held*, (1.) that the corporation were not liable as strangers and apart from any statutory duty;

(2.) That, in the absence of negligence, the corporation were not liable under sect. 19 of the *Public Health Act*, 1875.

IN 1855, in exercise of their statutory duties, the mayor, aldermen and burgesses of the borough of *Derby* provided a system of drainage for their district, and, as part of that system, made a sewer that passed under *Ashbourne Road*, in the borough of *Derby*.

The corporation, in making this system of drainage and in constructing the sewer, exercised due care, and were not guilty of any negligence, the system, as constructed, reasonably providing for the district, and for the then probable increase of buildings which would have to drain into it.

The predecessors in title of *Stretton's Derby Brewery, Limited*,

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some years after the sewer had been made, erected a brewery which abutted on *Ashbourne Road*, part of the brewery having been built in 1869, and other parts in 1876, 1880, and 1881. As the different parts of the brewery were erected, the owners for the time being, in exercise of their statutory right, drained them into the sewer by communications which had to be and were first approved of by the corporation. These communications respectively ran to the sewer from the floors of the cellars of the several parts of the brewery, and when the communications between the brewery and the sewer were made, and for some years afterwards, the sewer was well constructed, and sufficient for the purposes of draining the district, and could cause no flooding, or probability of flooding, to the brewery. The floors of the brewery were, in fact, slightly above the crown of the sewer, so that the cellars could not be flooded from the sewer until the sewer got filled and a pressure was caused in it which forced the contents of the sewer up the communications through the floors into the cellars. On the 25th of June, 1891, a heavy storm occurred, which blocked the sewer and drove the sewage up the company's communications to their cellars, and flooded the cellars for a short time for a depth of about three feet, and, after the flood retired, left some inches of sewage matter on the floors of the cellars. This caused damage to the company, and they complained to the corporation. On the 25th of May, 1892, another but slighter flooding occurred, and on the 28th of June, 1892, there was another heavy storm and a flooding to the extent of about fourteen inches, which left a deposit of sewage, whereupon the company made further complaint of the damage which they had sustained. There was another flooding on the occasion of a heavy storm, which took place on the 11th of July, 1893, which was after the action mentioned below had been commenced.

The floodings arose, not from any want of repair in the corporation's sewer, but from the following circumstances:—

Owing to the large increase in the last few years in the number of buildings and places in the district which drained into the sewer, if a very heavy fall of rain occurred in a short space of time, the existing sewer became insufficient in size to carry off the sudden influx of water, and got choked, and so drove the

contents of the sewer up the company's communications, and into their cellars.

The above-mentioned facts were found by Mr. Justice *Romer* at the trial of the action mentioned below, when the learned Judge also said he thought that such floodings were likely, as matters then stood, to occur about once a year, and more frequently in the future as the number of drains increased with the further buildings which might be erected in the district drained; and he further found that if (as the company insisted) the floors of their cellars were to remain as low as they then were, and their communications were to run from those floors, the only way to prevent such liability to flooding was by the corporation constructing a new sewer, or a new system of drainage for the district.

Although some overflows at the brewery occurred between 1885 and 1890, no complaint was made to the corporation prior to June, 1891, after the heavy storm of the 25th of that month; and shortly after the floodings of May and June, 1892, the corporation considered the question of providing a new sewer or drainage system, and consulted experts as to what was the best thing to be done; but the report of the experts had not been received up to the time when judgment was delivered in the action.

On the 18th of August, 1892, the company commenced an action against the corporation, who were described as acting by the town council as the urban sanitary authority for the urban sanitary district of the borough of *Derby*, by virtue of the *Public Health Act*, 1875.

By their statement of claim the Plaintiffs alleged that they were the owners and occupiers of, and carried on business at, the brewery in *Ashbourne Road*; that the sewer above mentioned was "a sewer within the meaning of the said Act," and was "vested in and under the control of the Defendants as the said urban sanitary authority;" that from the sewer, and through the communications above mentioned, the Defendants "from time to time since the 25th of June, 1891, and from time to time during several years previously thereto," had "wrongfully discharged or permitted to be discharged or flow" on to the Plaintiffs' land

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"a quantity of water and sewage," and that great damage had thereby been caused to the Plaintiffs, and that the Defendants "continue the said sewer in such a condition and position as to cause an overflow therefrom of water and sewage," "to be wrongfully discharged or caused to be discharged or flow from time to time" through the communications on the Plaintiffs' land. And, in particular, they complained of an alleged wrongful discharge by the means aforesaid on the 28th of June, 1892, causing damage, of which particulars were given, to the amount of £223 2*s*. And the Plaintiffs claimed "(1.) An injunction restraining the Defendants from discharging, or allowing to be discharged or flow into or upon the Plaintiff company's said land or premises any water, or sewage, or foul or noxious matter, and from allowing water, sewage, or noxious matter to flow or to be discharged from sewers belonging to or vested in the Defendants on to the Plaintiff company's said land or premises, or from continuing the said sewer so as to be or cause a nuisance to the Plaintiff company. (2.) Damages."

Negligence was not expressly alleged by the statement of claim.

The statement of defence admitted that the sewer was "vested in the Defendants by and subject to the provisions of the *Public Health Acts* and not otherwise." It alleged that, if any water or sewage matter flowed from the sewer on to the Plaintiffs' land, it was through pipes and drains of the Plaintiffs, made and connected with the sewer by the Plaintiffs or their predecessors in title, and by reason of the cellars being too deep, and the pipes and drains being improperly connected with the sewer and at too low a level, and by reason of the Plaintiffs not having provided valves or other appliances for preventing the water and sewage in the sewer backing up the drains, and that "there was contributory negligence on behalf of the Plaintiffs." The statement of defence also alleged that the sewer was and always had been a good and properly constructed one, and sufficient in dimensions to carry off the ordinary sewage and surface water of the district; that it had always been kept in repair and cleansed, and that if any noxious matter had flowed from it, it was not through the Defendants' negligence. The Defendants also pleaded that the

damage (if any) sustained by the Plaintiffs was caused by an act of God, namely, excessive and unprecedented rainfall, and by the Plaintiffs' cellars, drains, and pipes being constructed and kept as aforesaid. As to the claim for damages, the Defendants (by par. 6) said the causes of action, if any, were "for things done or omitted to be done under the provisions of the *Public Health Act*, 1875," and that the notice in writing before action required by the Act had not been served; and that the alleged causes of action, other than in respect of what was said to have taken place on the 28th of June, 1892, did not accrue within six months next before action commenced.

The action was tried by Mr. Justice *Romer* on the 31st of October, and the 1st and 2nd of November, 1893.

Sir *E. Clarke*, Q.C., *Hextall*, and *R. C. Glen*, for the Plaintiffs:—

The Plaintiffs' complaint is in respect of damage which has not arisen from abnormal floods. Although they claim damages, the principal object of the action is an injunction. The Defendants rely on the *Public Health Act*, 1875, but they are not protected by any provision of that statute. Sect. 19 provides that "every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." The duty of the Defendants is to see that the sewer and the connections with it are right, and they have failed to perform their duty.

Notice of action is not necessary when the relief claimed against a local authority is an injunction to restrain an immediate injury: *Flower* v. *Local Board of Low Leyton* (1). If the Defendants say that, instead of bringing an action, the Plaintiffs should complain to the Local Government Board, under sect. 299, the answer is, that the nuisance having been caused by an act which, independently of the statute, would have given a cause of action to any person, the local authority is liable to an action unless it shews a justification, under statutory powers, for what is complained of: *Glossop* v. *Heston and Isleworth Local Board* (2).

(1) 5 Ch. D. 347. (2) 12 Ch. D. 102.

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*Neville*, Q.C., and *William Graham*, for the Defendants:—

Where there are cellars like those of the Plaintiffs, connected with the sewer in the manner shewn in the present case, it is clear that they must occasionally be flooded. The Plaintiffs' contention amounts to this, that we are bound to reconstruct the sewer if it becomes insufficient. But the Plaintiffs or their predecessors in title chose to connect their cellars with the existing sewer, and the Defendants had no control over the system of drainage which they chose to connect with it. The Defendants are not liable because the owners of new houses in the district have increased the burden of the sewer by draining their houses into it. If the Defendants have exercised their discretion reasonably as to the works necessary to drain their district, there is no appeal except to the Local Government Board. Sect. 15 of the *Public Health Act*, 1875, says that "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act"; but, if there is "default in providing their district with sufficient sewers, or in the maintenance of existing sewers," the remedy is given by sect. 299, which provides that, in case of complaint to the Local Government Board, the board "if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint," and this order may be enforced by mandamus, or by the board appointing some person to perform such duty. If the local authority has exercised its discretion, and the Local Government Board refuses to interfere, the Court will not interfere: *Reg.* v. *Tottenham Local Board* (1).

If the Defendants have simply neglected their statutory duty of providing an adequate system of drainage, there is no ground of action by an individual for damages or an injunction: *Glossop* v. *Heston and Isleworth Local Board* (2). What is complained of is no ground of complaint at all, apart from the statute; for the Defendants are not in the position of private owners. They have only a limited ownership in the sewers, and cannot stop them on account of the damage done to an inhabitant of the district;

(1) 9 Times L. R. 414. (2) 12 Ch. D. 102.

nor are they liable for not taking proceedings in respect of acts which they cannot themselves prevent: *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1). The duty thrown on the Defendants under the Act of 1875 is like that thrown on a district board under sect. 72 of the *Metropolis Management Act*, 1855; it is not an absolute duty to keep the sewers so as not to be a nuisance, but only to use all reasonable care and diligence to keep them in a proper condition: *Bateman* v. *Poplar District Board of Works* (2). In other words, the Plaintiffs cannot succeed unless they prove negligence: *Hammond* v. *Vestry of St. Pancras* (3). The position of the Defendants is very like that of the owner of a runaway horse who has not been guilty of negligence.

[ROMER, J.:—You say that, apart from the *Public Health Act*, 1875, the Plaintiffs could not succeed?]

Yes. The sewage matter complained of is not sent in by the Defendants, but by other people, and the Defendants have no control over it. The Defendants are under no common law liability, for they have no common law duty. If there is any duty it is statutory. The Defendants are not within the doctrine of *Rylands* v. *Fletcher* (4), for they are not bound to warrant that their sewer will retain what is sent into it.

All the Defendants have done is to construct a sewer, which was done rightfully, and in accordance with Act of Parliament, before the Plaintiffs' buildings came into existence. The Plaintiffs' predecessors think fit to make a hole in the sewer and connect it with their drainage, and the Defendants only consent to this to the extent of not stopping them. The sewer was originally sufficient, and even now an overflow only occasionally occurs. The difficulty of preventing it has been shewn, for the only certain way to do it is by lowering the sewer, the effect of which would be to flood the lower parts of the town unless means were taken which are now under consideration. Under these circumstances, no wrongful act is committed. Whatever damage is done is caused by the Plaintiffs' connection. They can safely

(1) 20 Ch. D. 595.
(2) 37 Ch. D. 272.
(3) Law Rep. 9 C. P. 316.
(4) Ibid. 3 H. L. 330.

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drain all their premises, except the cellars, into the sewer, and if they retain their connection with the cellars, they do so at their own risk. The Defendants could only comply with an injunction by cutting off the connection. The Plaintiffs have not given the notice of action required by sect. 264 of the *Public Health Act*, 1875.

[They also referred to *Chapman, Morsons & Co.* v. *Guardians of Auckland Union* (1).]

Sir *E. Clarke*, in reply:—

The Defendants are really asking the Court to extend the principles of *Glossop* v. *Heston and Isleworth Local Board* (2), and *Attorney-General* v. *Guardians of Poor of Union of Dorking* (3). In the former case, *James*, L.J., explains why the injunction was not granted, when he says (4): "All that can be alleged against the defendants, even if the allegation were sustained, which does not appear to me to be the case, is, that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district in which the plaintiff is one of the inhabitant landowners." In *Attorney-General* v. *Guardians of Poor of Union of Dorking*, the state of things complained of existed before the commencement of the Defendant's powers, and *Jessel*, M.R., said the balance of convenience was to be considered in dealing with the question of granting an injunction.

In *Bateman* v. *Poplar District Board of Works* (5), the connection with the sewer had been made illegally, and without the defendants' knowledge; if the connection had been made with the consent of the drainage authority, as in this case, the defendants would have been held liable. *Hammond* v. *Vestry of St. Pancras* (6) is to the same effect, and could not have been reasonably decided otherwise than it was.

*Reg.* v. *Tottenham Local Board* (7) was the case of a builder who wanted sewers made, but did not wish to pay for them, and the Court held that, as a private individual, he could not enforce the

(1) 23 Q. B. D. 294.
(2) 12 Ch. D. 102.
(3) 20 Ch. D. 595.
(4) 12 Ch. D. 117.
(5) 37 Ch. D. 272.
(6) Law Rep. 9 C. P. 316.
(7) 9 Times L. R. 414.

performance of a public duty. In a recent case, the defendants, the drainage authority, were put under an undertaking that they would not, without the order of the Court or the plaintiff's consent, permit further communications between houses and the main pipes: *Attorney-General* v. *Clerkenwell Vestry* (1). Here a nuisance occurs which specially affects the Plaintiffs. They do not seek an injunction in order to obtain a benefit by something being done for which the local authority is not responsible.

[ROMER, J.:—But, under the *Public Health Act*, 1875, assuming communications are made with the consent of the local authority, and damage ensues, have the Plaintiffs a cause of action?]

Yes. If, after sanctioning the connection, sewage is allowed to come down which, under ordinary circumstances, will overflow into the Plaintiffs' premises, there is ground for an action. It cannot be set up as a defence that the filth came through a drain, when that drain was connected with the sewer with the Defendants' consent. The defence is really that the Defendants have not been guilty of negligence; but if it is necessary, they must change their system of drainage. They are responsible for the mischief caused by the sewage coming down in larger quantities than the sewer can carry off.

1893. Nov. 23. ROMER, J. (after stating the facts, continued):—

Assuming that it has become the duty of the Defendants, as the sanitary authority, to consider the question of constructing, and in due course to construct, a new sewer or a new drainage system, I have to consider whether the Defendants, when this action was commenced, or up to the date of the trial of this action, were guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence in maintaining the existing sewer, and in not providing the new sewer or new system of drainage. As to this, I find that the Defendants were not guilty of negligence or of want of reasonable care or diligence. In the first place, it is clear that the Defendants—so long as the present sewer existed, and until its insufficiency, owing to the increase

(1) [1891] 3 Ch. 527, 535.

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of buildings, rendered it necessary to construct a new sewer or new sewage system—were not guilty of negligence in maintaining the present sewer, or, because, until the new sewer was made, the owners of the new buildings, as they were erected, exercised their statutory rights to drain into the existing sewer. So that the question of negligence resolves itself into this—whether the Defendants were guilty of negligence in not providing a new sewer or new sewage system; and, as to this, I come to the conclusion that there was no negligence for the following reasons: As observed by Mr. Baron *Bramwell* in *Ruck* v. *Williams* (1), "negligence is a relative term," and "must mean negligence with reference to some circumstances of time, place, or person." Now, the negligence, if any, of the Defendants in the present action is not in omitting to do repairs or small works of that kind, which could be speedily done, but in not constructing a new sewer or sewage system for the district in due time after its necessity had become apparent. Now, I am satisfied on the evidence before me that the construction of such a new sewer or sewer system as is requisite is, having regard to the size of the town and the configuration of the Defendants' district, a large, expensive, and very difficult undertaking, and one requiring considerable and careful inquiry and the advice of experts, necessarily occupying a considerable time before any plan or scheme for the new sewer or system could with propriety, and in the exercise of reasonable care, be adopted or commenced; and the carrying out of such plan or scheme must of necessity occupy a considerable time. The difficulties in the way of the Defendants are great. If, for instance, the sewer be lowered or enlarged, or if an additional or storm-sewer be provided, a difficulty arises as to how the sewage or waters carried down can be disposed of, and, unless some new way were carefully thought out, it might happen that relief would be granted to the Plaintiffs only by flooding the lower parts of the town to which the sewer runs after passing the Plaintiffs' premises. Now, it appears that more than a year ago the Defendants considered this question of a new sewer or drainage system, and consulted experts of great eminence, who were to report as to what was the best thing to

(1) 3 H. & N. 308; 27 L. J. (Ex.) 357, 361.

be done under the circumstances; but the report, though expected very shortly, has not yet been sent in, owing to the difficulties and magnitude of the case. Under these circumstances, I do not think that the Defendants can be fairly said to have acted unreasonably or negligently in not proceeding with the construction of a new sewer or new sewage system. It was suggested that they might have consulted the experts sooner than they did. But the first complaint to them was only in June, 1891, when the flooding was caused by a storm of a most unusual character—a storm which one of the Plaintiffs' witnesses said was the heaviest he ever saw—and the Defendants might well regard this as not likely to recur. There was some evidence of overflows at the brewery before June, 1891, but no particulars were given, or dates, except that the overflows were after 1885 and near the year 1890, and no complaint was made about them to the Defendants, though one of the Plaintiffs' witnesses said that he verbally complained to a nuisance inspector. Then, after the overflow of June, 1891, nothing occurs until the floodings of May and June, 1892, and, though Defendants refused to admit any liability for the damage thereby caused, it must have been shortly after this that they consulted the experts; and, under these circumstances, I cannot think they were guilty of negligence or of want of reasonable care and diligence in not previously taking active steps in the matter. It is, however, noticeable that the Plaintiffs' statement of claim does not expressly allege negligence on the part of the Defendants, and that on behalf of the Plaintiffs, in opening their case, it was stated that they were not bound to allege or prove negligence. The question now arises whether, on the above findings of fact, the Defendants can be held liable. The Plaintiffs put their case in this way: They say, broadly, that as the sewer was made by and belongs to the Defendants, the Defendants are liable for the nuisance caused to the Plaintiffs by that sewer, whether they have been guilty of negligence or not, and are not protected from such liability by any provisions of the *Public Health Act* or of any other Act. And in support of this general proposition the Plaintiffs contend—(1.) that, apart from any statutory duty cast upon the Defendants, and treating the Defendants as strangers who have a private

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sewer of their own, the Defendants must be held liable; and (2.) that the Defendants are liable because they have infringed the provisions of sect. 19 of the *Public Health Act*, 1875, which enacts, *inter alia*, that "every local authority shall cause the sewers belonging to them to be constructed . . . and kept so as not to be a nuisance." Now, with respect to the first contention, I do not see how the Plaintiffs can say that they are entitled to treat the Defendants as strangers. The nuisance to the Plaintiffs would not have been caused but for the communications opened by their predecessors in title with the Defendants' sewer. No part of the sewage or water in the sewer would have got on the Plaintiffs' premises but for those communications which the Plaintiffs' predecessors made in exercise of the rights given to them by sect. 21 of the *Public Health Act*, or the corresponding section in the prior public health Act (*i.e.*, sect. 8 of the *Sanitary Act*, 1866). It was because the Defendants were not strangers, but a public body making and maintaining a sewer for public purposes and for the benefit of the inhabitants of the district, that the above rights were given, and that the Defendants were bound to allow the communications to be made, subject to the "mode" in which the communications were made being approved. It appears to me that, when under and by virtue of statutory duties and powers, works are made and maintained by a public body for the benefit of the public, or of a section of the public, and a member of the public, in exercise of the statutory rights given to him, uses those works, and thus suffers damage, the rights of that member, and the liability of the public body in respect of such damage, are to be ascertained, not by considering how matters would stand if the parties could be regarded as strangers, but by reference only to the statutes under which the works were made, maintained, and enjoyed. And to make the public body liable under the circumstances you must find that liability cast upon the public body by the statutes in question, either by express provision or reasonable intendment. This brings me to a consideration of the Plaintiffs' second contention and the statutes governing the present case, and the only statute I need consider is the *Public Health Act*, 1875. Now sect. 19, on which the Plaintiffs rely, is in point of wording unlimited as to

the liability it casts upon the Defendants. But it has long since been held—and I take it to be now settled—that by reasonable construction of an Act such as this the liability in circumstances like the present, though in form not limited, is in fact limited to cases where the public authority has been guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence. (See *Hammond* v. *Vestry of St. Pancras* (1) and *Bateman* v. *Poplar District Board of Works* (2), cases under sect. 72 of the *Metropolis Local Management Act*, 1855, which section is substantially the same as sect. 19 of the *Public Health Act*. See also *Brown* v. *Sargent* (3), a case under the *Public Health Act*, 1848, sect. 46 of which is for present purposes practically identical with sect. 19 of the present Act. See also, on the question of the general principle governing cases like the present, *Blyth* v. *Company of Proprietors of the Birmingham Waterworks* (4), *Whitehouse* v. *Birmingham Canal Company* (5), and the above-mentioned case of *Ruck* v. *Williams* (6)). This being so, as I have found as a fact no negligence on the part of the Defendants, they cannot, in my judgment, be held liable under sect. 19. Nor do I find from any other provision of the *Public Health Act*, nor can I reasonably gather from that Act, that the Defendants are to be liable, in a case like the present, in the absence of negligence. This disposes of the action, for as no legal wrongdoing by the Defendants has been established, the Plaintiffs are entitled neither to damages nor to an injunction, nor are they, as suggested by Plaintiffs' counsel, entitled to call upon the Defendants for any such undertaking as was voluntarily given by the Defendants in the case of *Attorney-General* v. *Clerkenwell Vestry* (7). The action must be dismissed with costs.

Solicitors: *Greenfield & Cracknall*, agents for *W. H. Briggs, Derby; Satchell & Chapple*, agents for *J. & H. F. Gadsby & Coxon, Derby.*

(1) Law Rep. 9 C. P. 316.
(2) 37 Ch. D. 272.
(3) 1 F. & F. 112.
(4) 11 Ex. 781.
(5) 27 L. J. (Ex.) 25.
(6) 3 H. & N. 308; 27 L. J. (Ex.) 357.
(7) [1891] 3 Ch. 527.

F. E.

VAUGHAN WILLIAMS,

1893
Nov. 22.

# *In re* MEDICAL BATTERY COMPANY.

[00298 of 1893.]

*Company—Winding-up—Petition for Winding-up by Order of the Court—Voluntary Winding-up—Creditors Prejudiced—Charges of Fraud on Outside Public—Public Examination—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 91, 145—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

Where charges have been made against a company of having committed frauds (not in any way connected with its promotion or formation) in its dealings with members of the outside public, not being dealings with shareholders as regards their membership in the company, the desirability of investigating such charges under a compulsory winding-up is not a ground for saying that creditors will be "prejudiced by a voluntary winding-up" within the meaning of sect. 145 of the *Companies Act*, 1862.

THE *Medical Battery Company, Limited*, was incorporated on the 6th of May, 1889, with a capital of £100,000, divided into 20,000 shares of £5 each, all of which were issued and were credited as fully paid up.

Mortgage debentures, which were alleged to be a charge on all the company's property, both present and future, including its uncalled capital, were issued to secure £7700.

On the 26th of October, 1893, an action against the company was brought to enforce the debentures, and in this action, on the 27th of October, 1893, *A. J. Davis*, a chartered accountant, was appointed receiver of the property charged by the debentures.

On the 30th of October, 1893, an order was made in the action, giving liberty to *Davis* to carry on the company's business so far as might be necessary to realize the assets, to complete existing contracts or engagements, and to pay the expenses of the staff necessary for these purposes. On the 4th of November judgment was pronounced in the action.

On the 27th of October, 1893, a petition was presented by a creditor, asking that the company might be wound up by the Court, and this petition was answered for the 8th of November, 1893.

On the 3rd of November, 1893, an extraordinary resolution

was passed by the company, that it had been proved to its satisfaction that it could not by reason of its liabilities continue its business, and that it should be wound up voluntarily, and that *A. J. Davis* should be appointed liquidator in such winding-up.

At the hearing the petition stood over with the leave of the Court, in order that it might be amended by the insertion of an alternative prayer that the voluntary winding-up might be continued under the supervision of the Court, and by also inserting a prayer that some person who was independent of the debenture-holders might be appointed liquidator in the place of *Davis*, and in order that, as amended, the petition might be re-advertised.

The petition, having been amended and re-advertised, came on for hearing before Mr. Justice *Vaughan Williams* on the 22nd of November, 1893.

In October and November, 1893, a series of articles appeared in the *Pall Mall Gazette*, purporting to contain an account of the transactions of the company, and making very serious allegations as to the conduct of its business. The numbers of this newspaper containing the articles were exhibited to an affidavit filed in the winding-up. They were not read in Court, but were stated by counsel to contain serious charges of fraud and swindling. At the time when the petition was heard an action of libel, in respect of the above-named articles, brought by *C. B. Harness*, the managing director of the company, against the publisher of the *Pall Mall Gazette*, was pending, and criminal proceedings against *C. B. Harness* and other persons connected with the company were proceeding in one of the metropolitan police courts.

*C. E. E. Jenkins*, for the Petitioner, stated the facts of the case.

*Eve*, for creditors:—

A compulsory order should be made. Charges of fraud against the company and its managing director have been made in a newspaper. The charges made are, speaking generally, that the whole concern is a swindle perpetrated on the public. The numbers of the newspaper containing the charges are

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exhibited to an affidavit on the file. An investigation into the affairs of the company is necessary.

*Bramwell Davis*, for other creditors:—

The company ought to be wound up by the Court in order that there may be a public examination under sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890. Such an examination cannot be directed to be held in a winding-up under the supervision of the Court.

*Macnaghten*, and *T. S. Whitaker*, for other creditors asked that a compulsory order might be made.

*George Elliott*, for other creditors; *Haldinstein* (*Boxall* with him) for shareholders; and *Tanner*, for the Plaintiffs in the action, asked that the voluntary winding-up might be continued under the supervision of the Court.

*George Henderson*, for the company:—

The charges which have been made are in respect of alleged frauds by the company, acting by its servants, on the outside public. An action of libel has been brought against those who have made the charges, and the charges are now being investigated in a police court. Such matters are not within the scope of sect. 8 of the *Companies* (*Winding-up*) *Act*, 1890.

VAUGHAN WILLIAMS, J.:—

This case has occupied a good deal of time, and necessarily so, having regard to the peculiar circumstances of it. I consider it to be my duty to take care that I do not allow this matter to be determined by any topics of prejudice which have so freely been urged before me. It has been mentioned that criticisms have been made upon the conduct of the managing director of the company, and upon the business carried on by the company, which criticisms suggested that the whole company was a swindle and that the managing director was the chief swindler. It has also been said that civil proceedings have been taken by the managing director against the newspaper in which the

suggestions appeared, and that criminal proceedings have been commenced against him, and other persons connected with him in the business of this company, in respect of the matters set forth in the newspaper I have mentioned, and which he says are libellous. In these circumstances I must take care that I do not allow any proceedings in this Court with regard to the liquidation of the company to turn upon matters which are foreign to the liquidation or upon anything which is a matter of prejudice. I am, however, glad that the matter has been discussed at some length. At the time when the petition was presented no resolution for voluntary liquidation had been passed. All that had happened then was, that a debenture-holders' action had been commenced, and Mr. *Davis* had been appointed receiver in that action. But, after the presentation of the petition, an extraordinary resolution was passed, that it had been proved to the satisfaction of the company that the company could not by reason of its liabilities continue its business, and that it should be wound up voluntarily, and that Mr. *Davis* should be appointed liquidator. Although that resolution was not passed prior to the presentation of the petition, I am disposed to act on sect. 145 of the *Companies Act*, 1862, and not to make a compulsory order unless I am of the opinion that the rights of the creditors will be "prejudiced by a voluntary winding-up." It has been said that I ought to take into consideration that the rights of the creditors will be prejudiced by the voluntary winding-up, not only as regards money results, but also by their exclusion from the benefits conferred by the *Companies (Winding-up) Act*, 1890, and especially the investigation in public under sect. 8 of that Act. I propose to deal with both those suggestions, and see whether there is any evidence on which I ought to find that the creditors will be prejudiced pecuniarily by the continuance of the voluntary liquidation, and whether they will be prejudiced by not getting the benefit of sect. 8 of the Act of 1890; and I will deal with the last suggestion first.

In my judgment, I should be acting very wrongly if I held that sect. 8 was intended to apply to a case where the charges made were brought against the company of having committed frauds in the course of its business with the outside world, and

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not connected in any way with the promotion or formation of the company—that is to say, of its conduct towards persons dealing with it other than shareholders as regards their membership in the company. It seems to me that I ought not to say that creditors will be prejudiced by a voluntary winding-up on the mere ground that they have a right to have certain matters connected with the company investigated at a police court. The only way in which the fact that these charges have been made becomes material is, that those who wish that the voluntary winding-up shall be continued have relied on the desirability of carrying on the business with a view to its sale as a going concern; and with reference to this question, I am bound to take into consideration the fact that these charges have been made as evidence that the company is not, *primâ facie*, so flourishing that the business is likely to be carried on successfully. But, so far as concerns the suggestion that it is ground for a compulsory winding-up that an investigation into these charges is required, in my judgment I ought not to say that the creditors will be prejudiced by not obtaining the benefit of sect. 8 of the Act of 1890.

There are, however, other grounds for saying that creditors will be prejudiced by the voluntary winding-up. It is quite plain that the control of the company is in the hands of the managing director and his immediate family, and that the debenture-holders are under the same control, and this has resulted in their nominee becoming both voluntary liquidator and receiver. That being so, what are the prospects of the unsecured creditors? This is a company which has been, obviously, under the control of one man, and the evidence shews that Mr. *Harness* had practically the sole control of its affairs. [His Lordship referred to the evidence, and continued as follows:—] It would, in my judgment, be very prejudicial to the interests of the creditors that any one should continue to act as liquidator who is under the control of the shareholders, especially as the same person is now to remain as receiver in the debenture-holders' action. Had Mr. *Henderson* been instructed to consent that Mr. *Davis* should retire from the receivership, the result might have been different; but, having regard to the

fact that it is suggested that there will be little or nothing for the unsecured creditors, and that Mr. *Davis* is to be continued as receiver and practically have the control of the liquidation, it is not desirable, in the interest of the creditors, that the voluntary liquidation should be allowed to continue. It has, in my judgment, been shewn that the rights of the creditors would be prejudiced by the voluntary winding-up, and, therefore, I shall make a compulsory order. In doing so I am in no way influenced by any suggestion that it is desirable to investigate in the winding-up the charges which have been made with reference to frauds on the general public. That is a matter which should not be taken into account at all.

Solicitors: *Ingle, Cooper, & Holmes; Stanley, Woodhouse, & Hedderwick; Riddell, Vaizey & Co.; Rodgers & Co.; R. Furber; Boxall & Boxall; Jerome & Co.; Steinberg & Co.*

F. E.

C. A.
1894
Jan. 18.

## *In re* FISHER.

*Practice — Costs — Compulsory Purchase under Special Act—Payment of Purchase-money out of Court—Jurisdiction as to Costs where no Provision in Special Act—Rules of Supreme Court,* 1883, *Order* LXV., *r.* 1—*Supreme Court of Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Where an Act enabling a public body to take land compulsorily contains no provision as to the costs of payment out of Court of moneys paid in under the Act, the Court has under sect. 5 of the *Supreme Court of Judicature Act,* 1890, jurisdiction to order the public body to pay the costs of and incidental to a petition for payment out.

Judgment of *Chitty*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *Chitty* (1).

The Commissioners of Sewers, acting under the powers conferred on them by an Act of Parliament (57 Geo. 3, c. xxix.), purchased certain leasehold hereditaments, the purchase-money for which, amounting to £1475, was paid into Court and invested in Consols. A petition having been presented for payment out, of the money in Court, Mr. Justice *Chitty* granted the prayer of the petition, and ordered the Petitioner's costs of and incidental to the application to be paid by the Commissioners.

The Commissioners appealed on the question of costs.

*John Henderson,* for the Appellants :—

The Court has no jurisdiction to order the Commissioners to pay these costs. There was no power in the Court to order the payment of such costs before the *Judicature Acts,* and although Order LXV., rule 1, is expressed in general terms, it was not intended by that order to confer a jurisdiction which did not previously exist, but only to regulate the exercise of the existing jurisdiction. That was decided in *In re Mills' Estate* (2). The *Judicature Act,* 1890, s. 5, was not passed for the purpose of enlarging the jurisdiction, but of removing doubts which had arisen as to the effect of the order. The words in the section which enact that the Court shall have full power to determine

(1) *Ante,* p. 53. (2) 34 Ch. D. 24.

by whom and to what extent such costs should be paid were probably inserted by reason of the question which arose in *Garnett* v. *Bradley* (1) as to the restriction imposed in cases of slander of the 21 Jac. 1 c. 16, s. 6. [He also referred to *London County Council* v. *Churchwardens and Overseers of West Ham* (2); *Rockett* v. *Clippingdale* (3); *Tenant* v. *Ellis* (4), and *Reg.* v. *Justices for the County of London* (5).]

*Turnour Murray*, for the Respondents, was not called on.

LINDLEY, L.J.:—

I have no doubt about this case. Money has been paid into Court by the Appellants under the provisions of an Act of Parliament passed in the reign of *George* III. (57 Geo. 3, c. xxix.), which like a great many Acts of that period contained no provision as to payment of the costs of getting the money out of Court. The old Court of Exchequer held that it had an inherent jurisdiction where land had been purchased by a company and the money had been paid into Court under the provisions of an Act of Parliament, to make the company pay the costs of the payment out. The Court of Chancery took a different view, and held that there was no jurisdiction to order payment of such costs, and at the time of the *Judicature Act*, 1873, it had long been the settled practice of the Court not to award such costs. That state of things was very unjust, and in *Ex parte Mercers' Company* (6), the late Master of the Rolls thought that the difficulty was got over by the combined effect of the *Judicature Act*, 1875, and Order LV. of the Rules of Court framed under it. However, in *In re Mills' Estate* (7) that case was not followed, and the reason why it was not followed was that the Court held that no jurisdiction was conferred upon it by the Rules to order the payment of costs in cases where before the *Judicature Act* it would have had no power to do so. That difficulty was felt to be one that ought to be got rid of by legislation, and sect. 5 of the *Judicature Act*, 1890, was passed

(1) 3 App. Cas. 944.
(2) [1892] 2 Q. B. 173.
(3) [1891] 2 Q. B. 293.
(4) 6 Q. B. D. 46.
(5) 10 Times L. R. 189.
(6) 10 Ch. D. 481.
(7) 34 Ch. D. 24.

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for the purpose amongst other things of getting rid of what was admitted to be an unjust anomaly; and now when money is paid in under an Act of Parliament which contains no express provisions as to the costs of payment out, and an application is made for payment out, sect. 5 hits the blot and enables the Court to award such costs. The appeal must be dismissed.

KAY, L.J.:—

I am of the same opinion. The decision in *In re Mills' Estate* (1) was that Order LXV., rule 1, of the Rules of 1883, a good deal of which is in language very similar to this later statute, did not increase the jurisdiction of the Court. It was an order made by the Rule Committee, which had no authority to increase the jurisdiction of the Court, and therefore it was necessary to construe it in that restrictive manner to prevent it from being *ultrà vires*. Lord Justice *Cotton* put the case thus (2): "What was the object of these Rules and Orders? Was it to give to the Court a jurisdiction, which did not previously exist, or was it not rather to regulate the manner in which the jurisdiction given to the Court, and which the Court had independently of this rule, was to be exercised?" and he adopts the latter of these two views. The words of Order LXV., rule 1, according to their literal meaning, were large enough to increase the jurisdiction of the Court, but seeing that this would be *ultrà vires*, the Court adopted the other construction which I have just stated. That decision was in 1886, and with that decision before them the Legislature passed an Act which, to some extent, follows the words of the rule, but also goes beyond it. It runs thus: "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act"—those last words are not in the rule—"the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge." Then follow these additional words: "And the Court or Judge shall have full power to determine by whom and to what extent such costs are

(1) 34 Ch. D. 24. (2) 34 Ch. D. 33.

to be paid." Taking these last words alone, to what costs do they apply? Clearly to the costs of and incident to all proceedings in the Supreme Court. The object of words so plainly expressed must be to give the Court power to do that which it had not power to do before. In my opinion, it is impossible to read sect. 5 in any way but this. It is an enabling section enlarging the jurisdiction of the Court; giving it jurisdiction where it had not jurisdiction before in respect of costs. What is the limitation to that jurisdiction? The limitation is contained in a former part of the section, "subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute whether passed before or after the commencement of this Act." That means if there be a provision in the Judicature Acts or in the Rules of Court, or an express provision in any statute which limits the discretion of the Court, the Act is to be taken subject to that limitation; but it also means that the Court is to have a discretion where the former Acts are silent as to costs. It was for that very reason that the Act was passed. It was passed in consequence of the decision of this Court in *In re Mills' Estate* (1), and was intended to give to the Court a jurisdiction which, according to that decision, the rule did not give, inasmuch as the rule was not intended to have the same effect as an enabling statute. In this case we have a certain statute which enabled the Commissioners of Sewers to take land compulsorily. It did not provide, when the money in respect of such land was ordered to be paid out, for the payment of the costs of that proceeding, but there is no expression to the contrary; therefore, it does not come within the words in sect. 5 of the Act of 1890, "subject to the express provisions of any statute." It was this omission to give the Court power to deal with those costs which this Act was intended to supply. If we look at the reason of the thing, it is very hard upon a landowner that his land should be taken from him compulsorily and the money paid into Court, and that when the money is paid out he should have to pay the costs of it himself. It is one of the very cases which the Act was intended to meet.

(1) 34 Ch. D. 24.

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A. L. SMITH, L.J.:—

I am also of opinion that the judgment of Mr. Justice *Chitty* was right. We are asked to put a restricted construction on the Act of 1890, because in 1886 the Court, when asked to put a construction on Order LXV., rule 1, put a restricted construction upon that rule. But it was necessary to put that restricted construction upon the rule because otherwise the rule would have been *ultrà vires*. That made it necessary to pass the enactment contained in the *Judicature Act*, 1890. The language of sect. 5 is very like the language of the rule, but is more extensive. In my judgment this section is not to be restricted in the way in which the rule was restricted in *In re Mills' Estate* (1), but confers a jurisdiction on the Court to give costs, which it had not before.

Solicitors: *Paddison, Fullilove, Cummins, & De la Chapelle; E. A. Baylis.*

M. W.

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*Nov.* 8.

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1894
*Jan.* 17, 29.

## *In re* PONSFORD AND NEWPORT DISTRICT SCHOOL BOARD.

[1893 P. 1079.]

*Burial Ground—"Disused Burial Ground"—Partial User—Order in Council—Building Restrictions—Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 2, 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 2, 4, *and Schedule.*

Under the combined operation of the *Metropolitan Open Spaces Act*, 1881, s. 1, the *Disused Burial Grounds Act*, 1884, s. 2, and the *Open Spaces Act*, 1887, ss. 2, 4, and Schedule, a "disused burial ground"—upon which building is prohibited by sect. 3 of the Act of 1884—means any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not, and which has been partially or wholly closed under the provisions of any statute or Order in Council, or has become otherwise disused.

BY the deed of settlement, dated the 10th of February, 1842, of the *Newport (Monmouth) Cemetery Company*; after reciting that

(1) 34 Ch. D. 24.

it had been agreed that a company should be formed under the name and for the business or purpose thereinafter mentioned, and that a subscription should be opened for raising a capital of £4000 in 400 shares of £10 each, and that the several persons parties thereto had subscribed for shares, and had, for the purpose of forming the intended company, agreed to enter into the present deed of association or partnership: and reciting a conveyance of even date of a piece of land, about four acres in extent, to trustees for the intended company upon the trusts declared by the present deed: and reciting that such piece of land had been purchased out of moneys belonging to the intended company for the purposes of a cemetery, and that the same was intended to be held by the trustees (who were also parties to the present deed) upon the trusts thereinafter declared: It was witnessed that, for the purpose of forming the said company, it was agreed that the several parties to the present deed, all of whom were thereinafter referred to as "proprietors," and the several other persons who should become proprietors under the provisions thereinafter contained, should be a company under the name of the *Newport Cemetery Company*; that the business or purpose of the company should be to form and maintain in all or any part of the aforesaid premises, and in such other place or places as might thereafter be determined on, a general cemetery or cemeteries for the interment of all classes of persons of what religious persuasion soever they might be, but more particularly of the town of *Newport, Monmouthshire,* and its vicinity, and to make every suitable arrangement connected with such cemetery or cemeteries and with the decent interment therein of the dead. Then, after fixing the capital of the company and naming the first directors, trustees, and other officers of the company, and making various regulations for the management of the company, it was provided that, for the purpose of carrying into effect the objects of the company, the directors should convert the said piece of land, or any part thereof, into a cemetery or burial ground, lay out and enclose the same, construct vaults, make sewers, erect necessary buildings and suitable chapels, and obtain conservation of any part of the said ground, and enlarge the cemetery by purchasing adjacent land; also that the directors

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might at any time sell or let any messuages, lands, or hereditaments belonging to the company, or pull down, remove, or alter any houses, chapels, or other buildings of or belonging to the company, which should "for the time being appear inapplicable to the purposes of the company," and do and execute all acts, deeds, and assurances as should be necessary for effecting any such sale or lease.

The piece of land so conveyed to trustees for the company was subsequently enclosed for the purposes of a cemetery, and laid out with roads and footpaths; but no part of it was ever consecrated. It became known by the name of the "*Old Cemetery, Newport.*" In the middle of the south side of the cemetery, fronting a public road, an entrance with gates was provided leading up to a chapel set back a short distance from it, so that the portions of the land on each side of the chapel were of about equal extent. Interments took place exclusively in the eastern portion of the cemetery and in a strip along part of the northern side of the western portion.

By an Order in Council in 1878 it was ordered that burials should be discontinued "forthwith wholly in the old cemetery of *Newport, Monmouthshire,* except in private vaults and graves which are free from water and can be opened without the exposure of remains or coffins."

By a deed dated in 1885 the whole of the "*Old Cemetery*" was conveyed by the sole surviving trustee of the deed of conveyance of 1842, on the direction of the persons then beneficially interested under the deed of settlement, to trustees in trust to sell such parts as should be agreed upon by the persons beneficially interested, and to divide the proceeds among those persons; and those persons thereby revoked the said deed of settlement if and so far as was necessary to give effect to the present deed.

In or about the year 1887 a wall was built separating the unused portion of the cemetery from the used portion, there having previously been no actual division between the two.

By another Order in Council in 1890, after reciting that the Secretary of State for the Home Department was of opinion that the Order of 1878, in so far as it affected burials in the "*Old Cemetery*" should be varied, and that the directions thereinafter

set forth should be substituted for those contained in the said order with respect to burials in the said cemetery; it was ordered that, with the exception of the portion of the *Cemetery Company's* land coloured green on the plan which had been deposited at the Home Office, "burials should be discontinued forthwith and entirely in the old cemetery of *Newport*."

The land coloured green on the plan referred to in that order represented the unused or western portion of the cemetery. The used or eastern portion, with the used strip at the top of the western portion, was coloured blue on the plan, and was bounded on the south and west by public roads. The cemetery chapel stood on the blue, or used, portion, near the wall separating the unused from the used portion.

In 1891 the trustees of the deed of 1885 sold and conveyed the land coloured green, being the unused portion, to *Thomas Ponsford* for £500, and in 1892 *Ponsford* agreed to sell the same land to the *Newport District School Board* for £1000, subject to certain conditions of sale, and also subject to the approval of the Education Department, the land being required for the erection thereon of a board school. The purchasers then raised the following objection, by way of requisition on title: "By the combined action of the *Disused Burial Grounds Act* (47 & 48 Vict. c. 72), s. 3, and the *Open Spaces Act*, 1887 (50 & 51 Vict. c. 32), s. 4 (which latter section gave an extended construction to the section of the former Act), it shall not be lawful to erect any buildings upon any disused burial ground, interpreted as 'any burial ground no longer used for interments;' and the word 'burial ground' is, under the last Act, interpreted, according to the *Metropolitan Open Spaces Act*, 1881 (44 & 45 Vict. c. 34), to mean 'any ground whether consecrated or not which has been at any time set apart for the purposes of interment and in which interments have taken place since the year 1800.' It therefore becomes a serious question whether or no the whole of the '*Old Cemetery*'—as the whole of the land coloured blue and green was originally termed—was not 'set apart' for the purposes of interment, and so became, as a whole, a disused burial ground."

The vendor replied that he did not think the later Act

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applied to the land coloured green agreed to be sold, as it had never been set apart for purposes of interment, and could, under the original trust deed, have been used for building or other purposes at any time in the trustees' discretion.

A summons was then taken out by the purchasers under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that their requisition or objection was valid, and that the vendor was unable to make a good title.

The summons was adjourned into Court, and came on for hearing before Mr. Justice *North* on the 8th of November, 1893.

In the course of the argument before Mr. Justice *North*, information, acquiesced in by both sides, was given to the Court to the effect that, while the cemetery was in use, the portion coloured green was retained by the company under their own control, and was looked after and kept tidy by them like the portion coloured blue. What the steps taken to keep the portion coloured green in order actually were, could not be precisely stated; but there appeared to be no doubt that the grass was kept down either by mowing or by grazing sheep.

The question for argument was whether, having regard to the three Acts of Parliament next mentioned (being the Acts referred to in the purchasers' requisition), the land coloured green, the subject of the contract, was a "disused burial ground" within the meaning of those Acts—although in point of fact no burials had ever taken place in it—and therefore included in the prohibition against building.

By the *Metropolitan Open Spaces Act*, 1881—an Act amending the *Metropolitan Open Spaces Act*, 1877, and providing increased facilities for making open spaces in the metropolis available for recreation—it is enacted in the definition clause, sect. 1, that "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800."

By the *Disused Burial Grounds Act*, 1884, after reciting the *Burial Acts*, 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134, it is enacted as follows: Sect. 2, "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an

Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts." Sect. 3, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

By the *Open Spaces Act*, 1887—an Act extending certain provisions of the *Metropolitan Open Spaces Acts*, 1877 and 1881, to sanitary districts throughout *England*, *Wales* and *Ireland*—it is enacted, sect. 2, that "the *Metropolitan Open Spaces Act*, 1881, is hereby repealed to the extent mentioned in the schedule to this Act;" and sect. 4 is as follows: "In the *Disused Burial Grounds Act*, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the *Metropolitan Open Spaces Act*, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council. . . . "

The schedule to the Act of 1887 is headed "Portions of the *Metropolitan Open Spaces Act*, 1881, repealed;" and among the portions repealed are, in sect. 1, "the following words occurring in the definition of a 'burial ground,' viz., 'and in which interments have taken place since the year 1800.'"

*E. Ford*, for the purchasers:—

By the *Disused Burial Grounds Act*, 1884, building is prohibited on disused burial grounds. In the *Metropolitan Open Spaces Act*, 1881, a definition is given of disused burial grounds. By the *Open Spaces Act*, 1887, that definition is extended and made applicable to the *Disused Burial Grounds Act*, 1884. The effect of the three enactments is to prohibit the erection of buildings, except enlargements of places of worship, on any ground that has once been set apart for interment. The facts are conclusive that the land in question once formed part of a cemetery, the whole of which had been set apart for the purpose of interment, and where in fact interments no longer take place. There is no distinction, for this purpose, between

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parts of a cemetery where graves exist and parts where they do not.

*Bailhache*, for the vendor :—

Upon the facts I submit that the land coloured green formed no part of the actual cemetery, and that it has never been set apart for the purpose of interment. There are several clauses, particularly that conferring a power of sale, in the *Cemetery Company's* deed of settlement which contemplated that the company should set apart all the land they might acquire for interment. These clauses raise a presumption that such part of any land acquired by the company as might not for the time being be required for the purpose of their cemetery, would not be set apart for interment.

If, in any sense, it can be fairly said that the land in question ever was set apart for interments, it is not within the mischief aimed at by the prohibition. No interments have in fact been made there; it has not been consecrated; the enactments will be read so as to apply only to land irrevocably set apart for interments.

If the piece of land in question is held on the true construction of the Acts to have been set apart for the purpose of interment so as to come within the prohibition, so far as that part of the definition of prohibited land is concerned; the whole of the definition does not apply, for it cannot be said that where there have never been any interments in a piece of ground at all, it is "no longer used" for the purpose of interment.

NORTH, J.:—

I think that the objection to title is well founded. I cannot doubt that both the green and blue land became part of one burial ground after they were acquired by the company in 1842; and until the building of the wall in 1887 they were not in any way separated, but formed one entire enclosure, laid out and used for the purpose of a cemetery. [His Lordship then stated the facts, and proceeded:—]

In addition to these facts I have been informed in Court as to the mode in which the green ground was used, and I take it as

proved that the whole of the land has been kept in order by the *Cemetery Company* for the purpose of looking decent and tidy, the green part having been looked after by them like the rest of the ground, and never been let to anybody else; and they have allowed sheep to graze there. It has to be borne in mind that no distinction was drawn between the two parts until quite recently, from the time the whole was acquired in 1842. Of course what was actually used for interment at any one time was only a portion of the whole. No doubt in this cemetery, as in others, rules were made by which persons were not allowed to select graves here and there all over the place; but certain portions were set apart, and the other parts were not allowed to be used till such portions had been substantially filled up. I have no doubt, therefore, the whole was acquired and set apart for the purpose of a cemetery. All the graves were placed in the eastern part of the cemetery, except that they extended over a strip on the north of the western half.

I have been referred to a certain clause in the company's deed of settlement which enables them to sell unnecessary land. That was only a reasonable provision to insert in such a deed, for the company might have acquired more land than they wanted to set apart for a cemetery. I do not see anything in the power of sale inconsistent with this having been set apart as one entire burial ground.

Then we come to the Order in Council made in 1878, an order binding on the company. The order provides that burials should be discontinued "forthwith wholly in the old cemetery of *Newport, Monmouthshire,* except in private vaults and graves," &c. That applies to the whole of the old cemetery, that is, both the green and blue land. The terms of that order shew beyond question that the whole of the land was treated together as constituting one cemetery. Then in 1890 a further Order in Council was obtained amending the former order, the piece of land coloured green having been, in the meantime, about the year 1887, separated by a wall from the land coloured blue. The Order of 1890 refers to a plan of the whole of the ground deposited at the Home Office, in which the two parts are distinguished by the respective colours green and blue; and it

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provides that with the exception of the portion of the *Cemetery Company's* land coloured green, "burials should be discontinued forthwith and entirely in the old cemetery of *Newport*." Here again it is taken for granted that the old cemetery includes both the green and the blue land. The cemetery meant is not any particular part of the land belonging to the company; it is clearly the whole of both pieces; so that I come to the conclusion that down to that time everybody had believed and taken for granted that the whole was one cemetery.

Then to apply the Acts of Parliament. I do not think any difficulty arises on these. The *Metropolitan Open Spaces Act*, 1881, sect. 1, contains this definition: "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800." It is to be observed that the expression is not "used for," but "set apart for," the purpose of interment; and it seems to me that the whole of the land bought by the company was "set apart for the purposes of interment."

Then we come to the *Open Spaces Act*, 1887, s. 4, which provides: "In the *Disused Burial Grounds Act*, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the *Metropolitan Open Spaces Act*, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

Then the Act of 1884, s. 3, provides: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

To my mind, the land coloured green is a "disused burial ground," and the prohibition against building applies.

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The vendor appealed.

The appeal was heard on the 17th and 20th of January, 1894.

*Bailhache*, for the Appellant:—

The first question is whether this piece of ground coloured green has been "set apart for the purposes of interment," within the definition clause, sect. 1, of the *Metropolitan Open Spaces Act*, 1881. I submit not. No doubt there has been a setting apart of that portion of the old cemetery which has been used for interments; but I contend that there has been no setting apart of that portion in which there have been no interments. Setting apart implies finality and exclusiveness of purpose. You cannot say that a piece of ground is "set apart" for burials unless it is irrevocably and exclusively appropriated or set apart: *Foster* v. *Dodd* (1). Surrounding the ground with a wall is not in itself sufficient to make a setting apart. By the deed of settlement the company were constituted trustees, not for the public or for any public body, but for their own purposes; so that they could at any time change their minds and divert this land to any other purposes, such as a tin-plate factory, for example. In fact, they reserved to themselves a power to sell or let any part of the property which they might find unnecessary. Under such circumstances there could be no irrevocable setting apart. I admit that if land is so devoted to purposes of interment that the owner cannot divert it to other purposes, then there is a setting apart; but here nothing has been done on the unused land irrevocably setting it apart for burials.

*E. Ford*, for the Respondents, the purchasers:—

The mode in which the land, when bought in 1842, was laid out shews it was "set apart for the purposes of interment," for a chapel was built in the exact centre of the lower portion of it, and the necessary roads and paths were made. There is no authority that a setting apart under the Act means an irrevocable setting apart. As regards the purpose for which the land was bought by the company, the trust deed shews that the company had but one object in contemplation—namely, to establish a cemetery, and the deed does not suggest any other possible user of the land. At all events, if the company could change the purposes of the land it must be to cognate purposes only. This

(1) Law Rep. 1 Q. B. 475, 487; 3 Q. B. 67, 75.

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cemetery—that is, the whole of the land purchased in 1842—comes literally within sect. 4 of the Act of 1887, for it has been partially closed for burials, under the Orders in Council of 1878 and 1890, and is, therefore, as a "disused burial ground," subject to the restriction against building in sect. 3 of the Act of 1884. Had it not been for the Act of 1884, the company might have sold any part of the ground for building purposes. Now they may still sell, but subject only to the restriction against building. Except for building this land would be useless to us; we could not even use it as a school playground, for there is no land adjoining which would be available for a school building. The effect of the repeal by sect. 2 of the Act of 1887 and the schedule, of the latter words of the definition in sect. 1 of the Act of 1881, is to give full scope to the words "set apart for purposes of interment," so that a "burial ground" now means any ground set apart for those purposes, whether burial actually takes place in it or not.

LINDLEY, L.J.:—

In my opinion, the construction of these Acts of Parliament is not so plain as one could wish; but still I have no doubt that the purchasers ought not to be compelled to take a title which would expose them to the risk of an indictment for building on the land purchased.

The first point is, whether we are to take this cemetery—that is, the whole of the land known as the "*Old Cemetery*"—as a whole, and see whether it has been set apart as a cemetery for interments; or whether we should treat it as subdivided into bits, and see whether each bit has been so set apart. In my opinion, we ought to look at the cemetery as a whole and not in bits; and, if we look at it as a whole, it appears to me that, as a matter of fact, it has been set apart as a burial ground. I think that is so, notwithstanding the clause in the deed of settlement providing that the trustees may sell or let any part of the land. If they sell the land as a whole, it must be so sold subject to the consequences of its having been set apart as a burial ground.

The *Disused Burial Grounds Act*, 1884—which is a prohibitive Act—says this, in sect. 3: "After the passing of this Act it shall

not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church," and so forth. What is meant by a "disused burial ground"? For that we must look at the Acts of 1881 and 1887. The *Metropolitan Open Spaces Act*, 1881, says this, in sect. 1: "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." The rest of the definition has been repealed. Then the *Open Spaces Act*, 1887, says this, in sect. 4: "In the *Disused Burial Grounds Act*, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the *Metropolitan Open Spaces Act*, 1881, as amended by this Act." That refers to the schedule to this Act of 1887, which schedule strikes out the words in sect. 1 of the Act of 1881, "and in which interments have taken place since the year 1800," and which words I therefore did not read. Then sect. 4 of the Act of 1887 goes on: "And the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

Now, putting all these enactments together, and applying them to this case, it strikes me that the old cemetery cannot be built upon at all; that would be my view if I were trying an indictment or an information of the Attorney-General.

In my opinion, therefore, the purchasers are right in their objection, and the appeal must be dismissed.

KAY, L.J.:—

I am of the same opinion. This burial ground—the whole of it—was bought by the *Cemetery Company*, for the purpose of providing a place of interment for the dead. They bought this ground for that express purpose. They surrounded it by a wall, made roads and paths, and erected a chapel, and they buried in the ground to a very considerable extent, not—as the plan shews—in the whole of it, but they first buried on one side, and then in a strip on the northern portion of the other side. The unused portion of the ground has now been divided from the rest of the cemetery by a wall, and the question is whether

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any building can be erected on that unused portion. With regard to that, the *Disused Burial Grounds Act*, 1884, is said to apply. By sect. 3 of that Act it is provided that "after the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church," and so on. The expression is "any disused burial ground." But the Act contains a definition of a "disused burial ground." It says, in sect. 2, "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." Now, I pause there. Supposing that had been the condition of the statute law on this subject at the present time, and an Order in Council had been made prohibiting any further burials in this cemetery; then, of course, the part not used would be a "disused burial ground" within the words of this Act. But before *Ponsford* bought from the company this unused piece of ground, the Act of 1887 was passed, and that Act alters the definition of a "disused burial ground" in the Act of 1884, namely, "a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." It is no longer to mean that, but it is to mean what the Act of 1887 says. The Act of 1887 first of all alters the meaning of the expression "burial ground" (not "disused burial ground") in the Act of 1881, which says, in sect. 1, that "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800." As the Act of 1881 originally stood, the term "burial ground" did not include any ground that had merely been "set apart" for interment, but any ground that had been so set apart "and" in which there had been interments since 1800. Now, the Act of 1887 alters that, and says, in sect. 2, that "the *Metropolitan Open Spaces Act*, 1881, is hereby repealed to the extent mentioned in the schedule to this Act"; and the schedule, under the head of "Portions of the *Metropolitan Open Spaces Act*, 1881, repealed," says, "In the same section"—that is, sect. 1 of the Act of 1881—"the following words occurring in the definition of a 'burial ground,' viz., 'and in which inter-

ments have taken place since the year 1800.'" So now you must read the term "burial ground" as meaning "any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." Thus, the effect of that is, that the term means any ground which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not; because the words in the original Act of 1881 requiring that, to make the ground a "burial ground," interments must have taken place within it, are expressly repealed. Therefore the term includes any ground set apart for interments, and in which interments have not taken place.

Then sect. 4 of the Act of 1887 says that, "In the *Disused Burial Grounds Act*, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the *Metropolitan Open Spaces Act*, 1881, as amended by this Act"; that is to say, it shall mean any ground which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not. Accordingly the next part of the section should be read thus: "And the expression 'disused burial ground' shall mean any burial ground"—that is, including any burial ground in which no interments have taken place—"which is not used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

Now one sees the alterations in the law. In 1884 a "disused burial ground" only meant a burial ground in respect of which an Order in Council had been made for the discontinuance of burials therein. At the present day it means a piece of ground set apart for interments in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused.

Now, we have to apply this state of the law to a particular piece of ground. This piece of ground, coloured green on the plan, was, in 1878, closed by an Order in Council, and burying in it was, by that Order in Council, prohibited. Then, afterwards, another Order in Council was made removing that prohibition—that is to say, allowing burials in this piece of ground; but no

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burials have ever taken place in it, and therefore it cannot be denied that it is in fact a burial ground which has not been used for burials. But it is said that it never was set apart as a burial ground, and therefore cannot be termed a "disused burial ground." The meaning now to be attributed to the term "disused burial ground" in the Act of 1884—namely, that it includes a piece of land set apart for interments, but in which interments have not taken place—makes that argument absolutely impossible. This ground was set apart as distinctly as any ground could be, though it is ground in which no burials have ever taken place. I cannot escape the conclusion that this ground is within the express words of the Acts of Parliament; that this was ground set apart for interments; although no interments have ever taken place in it, this is, therefore, a "disused burial ground" within the Act of 1884, and the restriction in the Act of 1884 applies to this ground. Unless that is the conclusion to be drawn from the words of this Act of 1884, the result would be this—that a piece of ground in the middle of a cemetery, or in any part of a cemetery, in which there may have been no burials, cannot be treated as a disused burial ground.

Another argument was, that to constitute a "burial ground," the ground must be irrevocably set apart as such, and that this piece of ground has not been irrevocably set apart as a burial ground, because there is a power of sale in the deed of settlement. I cannot hold this circumstance to take it out of the definition of a burial ground within the Acts. Accordingly, it appears to me that the learned Judge below was right, and that the appeal must be dismissed.

A. L. SMITH, L.J.:—

The question we have to decide is whether this piece of land has been "set apart for the purposes of interment." If it has been, it is within the Act of 1884; if it has not been, then the purchasers' objection fails. Mr. *Bailhache* has argued the case exceedingly well; but he has taken a number of isolated facts, and has said this does not, and that does not, and the other does not constitute a setting apart, within the meaning of the Act. He is quite entitled to put his argument in that way;

but, when I come to look at the state of things in and since 1842, I ask myself whether this land has been "set apart for the purposes of interment." In the first place, I find that in 1842 this land was bought for the purposes of interment. In the second place, it was enclosed by a wall for those purposes. Therefore, it was bought and enclosed as and for a burial ground. Thirdly, roads were made over the ground in which interments took place, the roads being such as were necessary and convenient for carrying out interments. Fourthly, a chapel was erected for those purposes.

In my judgment, this piece of land of four acres or thereabouts —the whole of it—was set apart for purposes of interment. As my Brother *Lindley* says, the proper way to approach the question is to take the whole four acres together, and not a part of them, in order to see whether there has been a setting apart. It appears to me that the true construction of the statute when applied to the facts prevents us from saying that this land has not been set apart, and that we must hold the purchasers' objection to be well founded.

Solicitors: *Daubeny & Mead*, agents for *J. Hutchins, Newport, Monmouthshire; Warriner & Kinch*, agents for *Lloyd & Pratt, Newport, Monmouthshire.*

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# *In re* GASQUOINE.
# GASQUOINE *v.* GASQUOINE.

[1892 G. 2039.]

*Executors—Liability for default of Co-Executor—Putting Assets into sole Control of Executor.*

The proposition in *Candler* v. *Tillett* (1), that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate is liable for the co-executor's misapplication of it must be read, "who unnecessarily does an act." Such an act is not "unnecessary" if it is done in the regular course of business in administering the property.

A testator up to his death was the registered holder of a large amount of American railway bonds. These bonds were issued payable to bearer, but the holder could register them, after which they could only be transferred by entry in the books of the company, but the owner could unregister them so as to make them again payable to bearer. Executors who desired to sell bonds of which their testator was registered holder could either sell and transfer them as registered bonds, or unregister them and then sell. It was proved that the former course was extremely unusual. The testator appointed his wife and two stockbrokers, *J.* and *C.*, his executors and trustees, and authorized *J.* and *C.* to charge for business done by them as stockbrokers for his estate. *J.* had been the testator's stockbroker. The executors determined to sell the bonds, and for that purpose the three unregistered them and put them in the hands of *J.* to sell. *J.* sold them and from time to time paid considerable sums into a bank to the account of the testator's estate, but ultimately absconded after misappropriating a considerable part of the proceeds. The dispositions of the testator's will were such that the sale could not be treated as an unauthorized act, and the absconding of *J.* took place within eleven months after the death of the testator. The testator's children brought this action to make all three executors liable for the loss:—

*Held*, that the unregistering the bonds and handing them to *J.* to sell were not "unnecessary" acts, and that the co-executors were not liable for *J.*'s misappropriation:

*Held*, further, that as *J.* was trusted by the testator, and his co-executors had no reason to suspect him, there had been no such delay in calling upon *J.* for an account as to make them liable.

Decision of *Kekewich*, J., affirmed.

*ROBERT GASQUOINE*, of *Southport, Lancashire*, by will dated the 6th of December, 1889, appointed his wife and *George James*

(1) 22 Beav. 257.

and *G. C. Chamberlain* executors and trustees, and, after giving divers pecuniary and specific legacies, he bequeathed to his trustees a legacy of £8000 upon trust to invest it and pay the income to his wife for life, and after her death he gave it to his three children in equal shares. He devised and bequeathed all his real and personal estate not thereby otherwise disposed of, subject to the payment of his funeral and testamentary expenses, debts, and legacies, to his trustees upon trust for his three children in equal shares, each share to vest at his death. In the event of any child of his dying in his lifetime, he gave the share of each such child to his or her children. He declared that it should be lawful for his trustees from time to time to arrange with any one or more of his children or grandchildren entitled to any share of his estate, that, as regarded any specific part of his property for the time being remaining unsold or not consisting of money, the same, instead of being sold and converted into money, should be taken by such children or grandchildren in satisfaction or part satisfaction of their shares at a price to be agreed upon by the trustees and other person or persons taking the same. He empowered his trustees to invest in Government securities, bank stock, debentures, debenture stock or guaranteed or preference stock or shares of railway companies, real or leasehold securities in *England* or *Wales*, or upon corporation or dock bonds. He declared that each of the said *G. James* and *G. C. Chamberlain*, or any future trustee who might be a stock and share broker, should be entitled to charge for all business done by him in relation to the estate, in the same manner as he would have been entitled to charge the executors and trustees for the same if he had not been himself an executor or trustee, but had been employed by the executors and trustees to do such business as their stock and share broker.

The testator died on the 28th of June, 1890, and his will was proved by all three executors on the 17th of July. The personal estate was sworn at £25,140.

*James* and *Chamberlain* were both of them stockbrokers, and were friends of the testator. *James* had been employed by the testator as his stockbroker.

Among the testator's property was a large amount of bonds of

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the *Grand Trunk Junction Railway Company*, the *Erie Railway Company*, and other American railways. The bonds of the *Grand Trunk Railway Company* contained the following provisions: "This bond and all the rights and benefits arising therefrom shall pass by delivery, and, at the option of the holders thereof, may be registered for the time being in the company's books at its office in the city of *London, England*, such registering being noted on the bond by the company's transfer agent or officer. After such registry no transfer shall be valid unless made in the company's books by the person registered for the time being as the said owner thereof, which transfer shall also be noted on the bond" . . . . "After registration as herein provided, and before the coupons shall be detached, the holders may transfer this bond on the company's books to the bearer, and thereafter it shall pass by delivery, but shall continue subject to successive registrations and transfers to bearer as aforesaid at the option of each holder."

The bonds of the other companies contained provisions to the like effect.

The *London* agent of the *Erie Railway Company* deposed to the following effect: He had under his control the registration and unregistration of bonds of that company. The bonds were issued payable to bearer. If a holder wished to register a bond he could do so. If he wished to register he had to execute a transfer to himself from bearer, and then the registrar entered on the back of the bond the date of the transaction and the name of the holder. If he then wished to sell the bond he might adopt either of two courses—he might transfer it as a registered bond, in which case it would remain a registered bond, but registered in a new name, or he might execute a transfer to bearer, in which case the registrar would mark the bond as payable to bearer. The witness deposed that the former course was very unusual and that he did not remember an instance of its having been taken, though he knew cases of bonds registered in the name of a testator being transferred to his executors as registered holders. The bonds of the other companies appeared to be governed by the same rules.

On the 26th of July, 1890, *James* wrote to Mrs. *Gasquoine*:

"Will you kindly sign the inclosed slip over my signature, and I shall be glad if you will post it in the inclosed envelope to-morrow. The slip is to enable the company to unregister the bonds out of Mr. *Gasquoine's* name, so that we can sell the bonds. Everything is proceeding satisfactorily with the estate."

The slip was as follows: "We hereby request you to convert the bonds numbered as under [numbers of the bonds], now registered in the books of the company in our names, to bearer bonds, and deliver them to Messrs. *Hurst, Daniell & Co.*, of 11, *Copthall Court, E.C.*"

*Hurst, Daniell & Co.* were the *London* agents of *James*, who was acting as stockbroker in the sale of the bonds. The slip was duly signed by the three executors, and other slips of a similar character were signed by them at different times down to the early part of November, 1890, so that all of them were in the sole control of *James*. The bonds were all disposed of before the end of November. Down to the early part of November, *James* paid into the account of the estate sums arising from sale of the bonds to the amount of more than £12,000. But he retained and applied to his own use sums amounting to some £8000 or £9000.

*Chamberlain* applied to *James* in April, 1891, for information about the sales, and was told that *James* hoped to get the matter closed before the end of June.

About the 8th of May, 1891, *James* absconded. Up to that time he was in good repute, and carried on a large business as a stockbroker, but he had for some time been, in fact, insolvent.

This action was brought by the testator's children against the trustees and executors with a view of making the co-trustees liable for the loss occasioned by *James's* defalcations.

Mr. Justice *Kekewich* held the trustees not liable. The Plaintiffs appealed.

*Renshaw*, Q.C., and *Yate Lee*, for the appeal:—

We contend that this unregistering was a wholly unnecessary act, by which the co-executors placed the bonds in the sole

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control of *James*, and that they are liable for his dealings with them: *Candler* v. *Tillett* (1).

[KAY, L.J.:—The doctrine there laid down must be qualified by inserting the word "unnecessarily," as in *Townsend* v. *Barber* (2).]

The act here was unnecessary. It does not appear that it is the practice to unregister bonds until they are sold. The bonds ought not in common prudence to have been sent to the broker until they were sold. The co-executors knew that the bonds were in the sole control of *James* from November, 1890, and from that time till his absconding in May, 1891, they did nothing more than make an occasional inquiry how the sales were going on. The objection that it would have been of no use to press *James*, as the money had been already misapplied before the end of 1890, is answered by *Mendes* v. *Guedalla* (3). The law on the subject is summed up, and, as we submit, correctly, in *Lewin* on Trusts (4).

*Warmington*, Q.C., and *R. N. Arkle*, for the Respondents, were not called upon.

LINDLEY, L.J.:—

This is one of those unfortunate cases in which it is sought to make several executors and trustees answerable for a fraud committed by one of their number. The others are not implicated in the fraud. That they were honest, there is no doubt; whether they were not careless is another matter. The testator appointed three persons to be trustees and executors—his widow and two men of business--stockbrokers. By his will he enabled them to charge for business done by them as brokers about his estate, which shews that he trusted them as proper persons to act as such for his estate. It is not necessary for me to read the will; it is sufficient to say that it authorized a realization of the estate, and that it could not be considered improper for the executors to sell these bonds, which were not securities an investment on which was authorized by the will. To shew that the executors were

(1) 22 Beav. 257.
(2) 1 Dick. 356.
(3) 2 J. & H. 259.
(4) 8th Ed. p. 265, s. 4.

the persons entitled to deal with the bonds, they had to send in the probate to the company's office. There were then two ways in which they might proceed to dispose of the bonds. They might transfer them as registered bonds to a purchaser, or they might unregister them so as to make them payable to bearer, and then sell. They took the latter course. *James*, who had been the testator's own broker, wrote to Mrs. *Gasquoine* on the 26th of July, 1890, "Will you kindly sign the inclosed slip over my signature, and I shall be glad if you will post it in the inclosed envelope to-morrow. The slip is to enable the company to unregister the bonds out of Mr. *Gasquoine's* name, so that we can sell the bonds. Everything is proceeding satisfactorily with the estate." Mrs. *Gasquoine* signed the slip, and so did *Chamberlain*. A similar process was gone through afterwards as to the bonds in the other companies. The bonds thus became bonds payable to bearer. In that state they were sent to *Hurst*, the *London* agent of *James*. *Hurst* sold them, and remitted the money to *James*. He has misapplied a considerable part of it, and the question is whether his co-executors and co-trustees are liable to make good his defalcation, on the ground that they placed the bonds unnecessarily under his sole control.

In considering this question, everything turns on the meaning of the word "necessity." In *Clough* v. *Bond* (1), Lord *Cottenham* says: "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper

(4) 3 My. & Cr. 490, 496.

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motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable: *Phillips* v. *Phillips* (1); or if he leave money due upon personal security, which, though good at the time, afterwards fails: *Powell* v. *Evans* (2); *Tebbs* v. *Carpenter* (3). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable, upon a proper investment in the £3 per Cents., for loss occasioned by the fluctuations of that fund: *Peat* v. *Crane* (4); but he is for the fluctuations of any unauthorized fund: *Hancom* v. *Allen* (5); *Howe* v. *Earl of Dartmouth* (6). So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator: *Langford* v. *Gascoyne* (7); *Lord Shipbrook* v. *Lord Hinchinbrook* (8); *Underwood* v. *Stevens* (9)." Apply those principles to the present case. Did these co-executors convert these bonds into bearer bonds in the ordinary course of business, and did they in the ordinary course of business allow *James* to have sole control over them? If they had suspected *James*, they might have exercised greater caution; but it does not appear that there was anything to raise suspicion, and the co-executors appear to me to have followed the regular course of business in administering the estate.

It is urged that the co-executors were guilty of negligence in not looking more closely into *James's* proceedings. I do not think so. Perhaps if they had suspected him and watched him more closely the loss might have been avoided; but considering that *James* was a person trusted by the testator and whom they had

(1) Freem. Ch. Ca. 11.
(2) 5 Ves. 839.
(3) 1 Madd. 290.
(4) 2 Dick. 499, n.
(5) 2 Dick. 498.
(6) 7 Ves. 137, 150.
(7) 11 Ves. 333.
(8) 11 Ves. 252; 16 Ves. 477.
(9) 1 Mer. 712.

no reason to suspect, and that the whole of these transactions took place well within a twelvemonth after the testator's death, I do not think that they were guilty of any such negligence as can make them liable for the loss.

KAY, L.J.:—

I am of the same opinion. The testator gave to his trustees £8000 upon trust for his widow for life and then for his children, and he gave the residue to his children immediately. At the death of the testator he had these bonds, which were not securities on which the trustees were authorized to invest. What was it their duty to do? They had to pay debts and to set apart £8000, which must be invested in authorized securities, and then to hand over the residue to the testator's children. Till all this was done their duties as executors were not fully discharged; so far I differ somewhat from Mr. Justice *Kekewich*, who appears to have thought that they were rather to be looked at as trustees than as executors. Now, what is the law as to the liability of executors for the defaults of a co-executor in whose sole power they have placed the assets? It is stated by Lord *Cottenham* in the passage which Lord Justice *Lindley* has read from *Clough* v. *Bond* (1). In *Townsend* v. *Barber* (2) Sir *Thomas Clarke* says: "I take it to be a general rule, that where one executor receives the whole, or part of his testator's estate, and pays it over voluntarily and unnecessarily to his co-executor, and the same is embezzled; if embezzled, or lost, he who so paid it over is answerable." The point of that is in the word "unnecessarily." In *Candler* v. *Tillett* (3) Lord *Romilly* says: "If one executor does any act which enables his co-executor to obtain sole possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor, who thus enables his co-executor to obtain possession of the money, is liable to make good the loss." I do not object to that statement if you introduce the word "unnecessarily."

It is important to observe in the present case that two of the

(1) 3 My. & Cr. 496. (2) 1 Dick. 356.
(3) 22 Beav. 257, 263.

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executors were stockbrokers, and that the will authorizes them to charge for stockbroking business done by them for the estate. This shews that the testator contemplated their acting as stockbrokers in respect of his estate. There was nothing wrong then in allowing one of them so to act. There was nothing wrong in converting these bonds; it might be the best course for raising the £8000, and might be the course most beneficial to the residuary legatees. The executors then resolved to convert these bonds. The bonds were registered in the name of the testator; the executors might have sold and transferred them as registered bonds, or they might convert them into unregistered bonds payable to bearer and then sell them. The latter is so much the more usual course that the registrar of one of the railway companies who gave evidence says that he had never met with an instance in which the other course had been taken. Here comes in the meaning of the word "necessary." Lord *Cottenham* in *Clough* v. *Bond* (1) says that, if an act is one which is required by the regular course of business, it is not an unnecessary act. On this principle was the decision in *Speight* v. *Gaunt* (2), where an executor was held not liable for the loss of trust moneys which he had paid over to a broker for investment, because the so doing was in the ordinary course of business, and therefore was held not to be "unnecessary." I therefore come to the conclusion that the putting the bonds into the hands of *James* as broker and the converting them into unregistered bonds were not unnecessary acts and do not make the executors liable for *James's* misapplication of the proceeds.

It has been urged that still the co-executors ought to be held liable because they allowed *James* to retain the money for a long time without calling him to account, and that, though *Chamberlain* made some inquiries, he was too readily satisfied with the answers given him by *James*, and ought to have looked further into the matter. But I cannot see that there was any unreasonable delay. *James* was selling the bonds from time to time, and from time to time he paid money into the bank to the account of the executors, so that there was no reason to suspect him. I think, therefore, that it was not unreasonable for

(1) 3 My. & Cr. 490. (2) 9 App. Cas. 1.

*Chamberlain* to be satisfied with *James's* answers. A year had not expired since the testator's death when *James* absconded. Up to that time there was no reason for suspecting him, and I think *Chamberlain* cannot be blamed for having believed him. I do not think that under the circumstances it would be right to hold his honest co-executors liable for the default of *James*.

A. L. SMITH, L.J.:—

I agree, and have nothing to add.

Solicitors: *E. Flux, Leadbitter, & Paterson*, agents for *Drake, Huddersfield; Pritchard, Englefield & Co.*, agents for *Arthur S. Mather, Liverpool.*

H. C. J.

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Nov. 23, 29.

# STODDART *v.* SAVILLE.

[1864 S. 109.]

*Marriage Settlement—Wife's Property—Ultimate Trust for Next of Kin—Words "die without having been married"—Child.*

By a marriage settlement, the trust fund was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default, to pay the income to her for life, for her separate use, and after her death, for such persons as she should by deed or will appoint, and in default, in trust for the persons who, under the statutes for the distribution of intestates' estates, would, on her death, have been entitled thereto, if she had died possessed thereof intestate "and without having been married." The wife died, without having appointed, leaving one child of the marriage:—

*Held*, that the trust funds went to the child.

*Emmins* v. *Bradford* (1) not followed.

## ADJOURNED SUMMONS.

By a settlement dated the 10th of October, 1868, and made on the marriage of *Georgiana Stoddart* (afterwards *Georgiana Quicke*) with *Sidney Godolphin Quicke*, property worth about £5000, belonging to the intended wife, was assigned to trustees upon trust to dispose of the same as she should from time to time by writing direct, and in default to pay the income thereof to her for life for her separate use; and after her death, as to the property, or so much thereof as should not have been disposed of during her life under such direction, for such persons as she should by deed or will appoint, and subject to any such appointment, "in trust for the person or persons who, under the statutes for the distribution of intestates' estates, would on the decease of the said *Georgiana Stoddart* have been entitled thereto if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take in the shares in which the same would have been divisible between them under the same statutes."

Mrs. *Quicke* never exercised her power of appointment, and died on the 21st of August, 1890, leaving an only son surviving

(1) 13 Ch. D. 493.

her; and the question now raised on the summons, which the trustees had taken out in this action, was whether the son could take under the ultimate trust as next of kin of his mother, or whether the words "without having been married" excluded a child by necessary implication.

*Farwell*, Q.C., and *Sefton Strickland*, for the next of kin:—

The words "without having been married" are clear and unambiguous, and much stronger than the word "unmarried," and must be construed as meaning, as if she had died a spinster. *Emmins* v. *Bradford* (1) is exactly in point, and we ask you to follow it in preference to *In re Ball's Trust* (2) or *Upton* v. *Brown* (3). In *Wilson* v. *Atkinson* (4) there was a particular context which both the Lords Justices relied on as shewing that it was unnecessary to attribute the proper meaning to the words "without having been married"; there is no context here which necessitates giving the words anything but their strict meaning. *Wilson* v. *Atkinson* is therefore distinguishable. There is no reason here why the words should not have their ordinary or primary meaning: *Dalrymple* v. *Hall* (5); *In re Sergeant* (6).

*Levett*, Q.C., and *E. Ford*, for the son:—

With the one exception of *Emmins* v. *Bradford* all the authorities are in favour of the son. The primary and natural meaning of "unmarried" in settlements of this kind is to exclude the husband; the "next of kin" is here, as is usual in settlements, a hypothetical class out of which the husband, and the husband only, is to be excluded: *Pratt* v. *Mathew* (7). "Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument, *i.e.*, the exclusion of the husband: *Clarke* v. *Colls* (8); and when construing the words "unmarried," or "without having been married," in making this hypothetical class you must not attribute to them a further result, which only follows from a conclusion of law that an unmarried woman cannot have children.

(1) 13 Ch. D. 493.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) 4 D. J. & S. 455.
(5) 16 Ch. D. 715.
(6) 26 Ch. D. 575.
(7) 22 Beav. 328; 8 D. M. & G. 522.
(8) 9 H. L. C. 601.

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*Wilson* v. *Atkinson* (1), and all the authorities following it, are based on this reasoning, and are in favour of the child, as against nephews and nieces, or more distant relatives. Mr. Justice *Stirling*, in *In re Arden's Settlement* (2), followed *In re Ball's Trust* (3) in preference to *Emmins* v. *Bradford* (4)

*Farwell*, in reply:—

In *Pratt* v. *Mathew* (5) and *Clarke* v. *Colls* (6) the word was "unmarried," not so strong an expression as "without having been married." In this settlement no provision at all is made for children. Why then should a construction be placed on these very clear words which would have the effect of giving the fund to a child, when on the face of the settlement children were not intended to benefit by it? Mrs. *Quicke* might have appointed or willed this fund to her son. She did nothing of the kind; perhaps this was done purposely. There is nothing here to control the literal meaning of the words used, and the next of kin, the nephews and nieces, are therefore entitled.

1893. Nov. 29. CHITTY, J.:—

The controversy turns on the ultimate trust in the marriage settlement of the late Mrs. *Quicke*, and arises between her only son and her nephews and nieces. The settlement excludes the husband, and makes no provision for the children of the marriage. It is in a very simple form. [His Lordship then stated the effect of the settlement and, after reading the ultimate trust for next of kin, continued:—]

Mrs. *Quicke* did not exercise her power of appointment with reference to the funds in question. The trust then is for the blood relations of the wife, to be ascertained according to the hypothesis, the terms of which are stated. The question as to the meaning of the words "without having been married," in an ultimate trust of this kind, in a marriage settlement, has been before the Courts on several occasions, and the decisions are conflicting. On the one side are *Wilson* v. *Atkinson*, decided

(1) 4 D. J. & S. 455.
(2) W. N. (1890) 204.
(3) 11 Ch. D. 270.
(4) 13 Ch. D. 493.
(5) 22 Beav. 328; 8 D. M. & G. 522.
(6) 9 H. L. C. 601.

by *Knight Bruce* and *Turner*, L.JJ., and *In re Ball's Trust* (1) and *Upton* v. *Brown* (2), both decided by Sir *Edward Fry*, and *In re Arden's Settlement* (3), decided by Mr. Justice *Stirling* in November, 1890, which support the son's contention; and on the other side stands *Emmins* v. *Bradford* (4), decided by Sir *G. Jessel*, which is in favour of the nephews and nieces. In *Wilson* v. *Atkinson* (5) there was no doubt a context. The settlement contained no express provision for children or issue. The context was, a declaration that for the purpose of the ultimate trust, an illegitimate child of the wife, should be deemed to be her lawful child. She left no lawful issue. Sir *J. Romilly* put a strict construction on the trust and declaration, holding that all issue were excluded, and that the effect of the declaration was, merely to place the illegitimate child in an excluded class (6). This decision, remarkable as it was for its strictness and perfect consistency, was reversed by the Court of Appeal. Both the Lords Justices, as I read their judgments, rested their decisions not merely on the declaration as special context, but also, as an independent ground, on the meaning which ought generally to be attributed to the words "die without having been married" in an ultimate trust for next of kin in a marriage settlement.

*Turner*, L.J., said that if it were necessary to construe the terms of the trust for the next of kin independently, and without qualifying them by the subsequent declaration, still, in his judgment, the trust for the next of kin ought not to be so construed as to exclude children, and that in either view the illegitimate child was entitled to the fund. In commenting on this case Sir *G. Jessel* appears to have surmised that there was some other context besides that stated in the reports. But I find myself unable, in the face of the reports, to supply by conjecture any context except that which appears in the reports themselves. When *Knight Bruce*, L.J., speaks of the context forbidding the reading of the words as signifying "without having been married to any one," and that he thought so independently of the declaration, I understand him to be using the term "context" in the

(1) 11 Ch. D. 270.
(2) 12 Ch. D. 872.
(3) W. N. (1890) 204.
(4) 13 Ch. D. 493.
(5) 4 D. J. & S. 455.
(6) 33 Beav. 538.

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broad sense of a marriage settlement. Sir *E. Fry* in the two cases before him, both being cases on marriage settlements and without any other context, held the words insufficient to exclude the wife's issue, and, following (as he stated in the second case) what he took to be the real principle of the Court of Appeal in *Wilson* v. *Atkinson* (1), interpreted the words as introduced merely to exclude any husband of the wife. Sir *G. Jessel* denied that there was any such principle, and he accordingly explained *Wilson* v. *Atkinson*, and declined to follow *In re Ball's Trust* (2) and *Upton* v. *Brown* (3). Notwithstanding his explanation, I cannot help concurring with Sir *E. Fry* that the Court of Appeal did proceed on a general principle. The words do not in express terms exclude issue. The exclusion of issue, if issue are to be excluded, is founded on the legal inference which follows from not having been married; for, of course, a woman who has never been married can never in point of law have had or leave issue. But the Court of Appeal appears to have declined to treat this legal inference, which is not expressed in terms, as being sufficient to shew that the father and mother intended by their marriage settlement to exclude the issue of the marriage or to prefer collateral relations to their own children, and, consequently, to have considered the words satisfied by confining them to the exclusion of any husband. *In re Arden's Settlement* having been cited only from the *Weekly Notes*, 1890 (4), I thought it right before giving judgment, to see Mr. Justice *Stirling*. I have ascertained from him, and am authorized to state, that the note of his judgment is substantially correct, and that in the conflict of authorities he thought it right to follow the Court of Appeal and Sir *E. Fry*. His decision, then, adds one more authority in favour of the son. I consider that I am bound by the preponderating weight of authority to decide, as I do, that the son takes.

Notice of appeal was given against this decision; but the appeal was not prosecuted, as the claim of the next of kin was compromised.

Solicitors: *Roy & Cartwright; H. Seaborne.*

(1) 4 D. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) Page 204.

W. C. D.

## *In re* GASKELL'S SETTLED ESTATES.

CHITTY, J.

1893 Nov. 9.

1894 Jan. 17, 18.

[1893 G. 434.]

*Application of "Capital Money"—Improvements—Mansion House—Alterations and Additions with a view to Letting—New Roof—Main Entrance—Heating Apparatus—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*.

The providing of a heating apparatus and pipes, though rendering a mansion-house more comfortable and convenient for occupation, is not an "improvement" directly or by analogy authorized by the *Settled Land Act*, 1882, s. 25, neither is it an "addition to or alteration in the building" within the meaning of the *Settled Land Act*, 1890, s. 13, sub-s. ii. But the placing of a new roof on a house—not necessarily the mansion-house—in substitution for a worn-out one, and the re-arrangement of the main entrance are "alterations" within the meaning of sect. 13, sub-sect. ii., which, if reasonably necessary and proper, may be properly paid for out of capital money.

### ADJOURNED SUMMONS.

This was an application by a tenant for life, asking that the trustees might be authorized to pay, out of capital moneys, for various improvements executed by him on the mansion-house as "additions and alterations reasonably necessary or proper to enable the same to be let." The facts, so far as material for the purposes of this report, were as follows:—

In October, 1889, when the present tenant for life, *Henry Brooks Gaskell*, succeeded to the settled estates at *Kiddington*, near *Woodstock*, in the county of *Oxford*, the mansion-house, *Kiddington Hall*, was old-fashioned and in a bad state of repair: the tenant for life, having decided to let the mansion, was advised that certain works were absolutely necessary before he could reasonably expect to obtain a tenant at a fair rent. These consisted (*inter alia*) of (1.) a new and efficient method of warming the house, which was of large size, and being built of stone, and standing upon clay, was cold; (2.) an alteration in the main entrance, which would provide a billiard room and render the house less cold and draughty; and (3.) the restoration of the roof, which was in a most dilapidated condition.

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These works had been carried out and paid for by the tenant for life, and the mansion-house was now let. It appeared that £394 had been spent on the heating and warming apparatus and pipes, £298 on the structural alterations, and about £760 upon re-roofing *Kiddington Hall*; and it was only as to the repayment for these three items of expenditure that any argument was addressed to the Court.

The evidence shewed (1.) that the mansion-house was built of stone at the end of the 17th century, and that in October, 1889, there was no proper method of heating it; that it was essential in order to bring the internal accommodation and conveniences up to the modern standard of comfort, to provide some method of keeping the house warm: (2.) that the original design of the house had been altered about the middle of the 18th century, and the main entrance made through the old billiard room, with the result that the house was made more cold and draughty, and the billiard room became the entrance hall, and unfit for its intended use; that, under these circumstances, it was most desirable to replace the entrance where it was originally designed to be, and that the effect of this alteration, when carried out, was to provide a comfortable billiard room and to render the house less cold and draughty, and also to provide a lavatory on the ground floor: (3.) that the roof and chimney stacks were in a dilapidated and dangerous condition, the roof leaked to such an extent as to endanger the timbers and injure the walls and floors of the upper rooms, and that it was absolutely essential to rebuild one of the chimney stacks, which might at any moment have fallen; and that the roof was so thoroughly bad that it was not advisable to attempt to repair it. That all these improvements were reasonably necessary and proper, both for the occupation of the house by the tenant for life, and to enable the same to be let.

*F. L. Wright*, for the tenant for life:—

Fixing up the boiler, and putting the necessary pipes all over the house, is surely an addition to the building; the evidence shews that the house is thereby improved and made more habitable and more readily let, and this expenditure may fairly be

paid for out of capital. There is no difference in principle between pipes to carry hot water over the house, and pipes to carry water for domestic consumption, which are provided for by sect. 25, sub-sect. xiii., of the *Settled Land Act*, 1882. As to the alteration of the main entrance, I submit this is clearly within the section.

As to the re-roofing, that was absolutely necessary, the house was not habitable as it was, it was impossible to let it. A new roof was one of the questions raised in *In re De Teissier's Settled Estates* (1), only in that case there was no letting in contemplation. Re-roofing is a permanent improvement: *In re Newton's Settled Estates* (2). Here the new roof was necessary to enable the house to be let, and it has now been let. I submit that it was an alteration within the meaning of sect. 13, sub-sect. ii., of the 1890 Act, and ought to be allowed. [He also referred to *In re Lord Gerard's Settled Estate* (3).]

*Micklem*, for the trustees:—

The heating apparatus is rather in the nature of a landlord's fixture than anything else; it is not an addition to the building within sect. 13, sub-sect. ii.

As to the alteration in the main entrance, the trustees will leave that to the Court, as they admit it is an improvement.

As to the new roof, the house has been neither added to nor altered; it is still the same house, and this alteration is not within the section. It is more like a case of repair.

[CHITTY, J.:—The roof appears to have been in such a state that you could not repair it.]

So much the worse for the tenant for life; still he is not entitled to have this paid for out of capital moneys; he is bound to repair.

[CHITTY, J.:—Under the usual covenants for repair in a lease, a landlord is not entitled to get a new house in place of the old one: *Payne* v. *Haine* (4).]

This is neither an addition to or an alteration in the building

(1) [1893] 1 Ch. 153.
(2) W. N. (1890) 24.
(3) [1893] 3 Ch. 252.
(4) 16 M. & W. 541.

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within the section. Tenants for life are not in the same position as tenants under a repairing lease.

*Wright*, in reply.

CHITTY, J.:—

The tenant for life asks to be allowed, under sect. 13, sub-sect. ii., of the *Settled Land Act*, 1890, the costs of providing a heating apparatus for *Kiddington Hall*, some £394, and one of the items of expenditure now under consideration. Sect. 13, sub-sect. ii., is very precise in its terms, and is confined to "additions to or alterations in buildings," and any improvement authorized under this sub-sect. ii. must therefore be an addition or alteration in the building; and the question I have to decide is, whether, on the fair construction of this sub-section, the heating apparatus is such an addition or alteration as was contemplated by the sub-section. The evidence as to this heating apparatus is not very definite, but I assume that it is of the usual kind, a fixed boiler with hot-water pipes running from it all about the house. No doubt the addition of these pipes has made the house much more comfortable and convenient for occupation, but this fact alone is not sufficient to bring the case within sub-sect. ii.

Sect. 13 of the *Settled Land Act*, 1890, is an enlargement of sect. 25 of the *Settled Land Act*, 1882; and having looked at that section again for the purpose of considering whether any of the improvements there mentioned are analogous to the one now under discussion, the nearest I can find are those provided for by sub-sect. xiii., "pipes and other works" for supply and distribution of water for domestic consumption; but reservoirs, wells and tanks are also specifically mentioned, and the cost of providing a fresh water supply has often been allowed under that sub-section, but that does not go far enough for the present case; I can find nothing analogous to a heating apparatus anywhere in any part of sect. 25, and the result therefore is, that that section is rather adverse, than favourable, to the contention of the tenant for life, and I must go back therefore to sect. 13, sub-sect. ii., of the 1890 Act. Considering that

section, as it stands, I am of opinion that this warming apparatus, however convenient it may be to the occupier, is neither an addition to or alteration in the building within the section.

The Court is bound to be on its guard in dealing with applications like this by tenants for life, who are naturally very anxious to have these kinds of improvements paid for out of capital moneys; indeed the present application shews how dangerous it is to take too wide a view of the scope of this section, because to do so may have the effect of causing the Court to unduly subject the Act to the strain of a benevolent construction in favour of tenants for life. The result therefore is, that I must decline to allow the costs of this heating apparatus to be paid for out of capital moneys.

As regards the change in the main entrance, and the other minor alterations consequent thereon, they appear to have been alterations in the structure of the building itself; and as they seem to be fit and proper in other respects, and reasonably necessary to enable the house to be let, they are in my opinion within sect. 13, sub-sect. ii., and I will allow the £298 expended for this purpose.

Now I come to the expenditure of some £700 or £800 in re-roofing *Kiddington Hall*; the case made out by the tenant for life is, that the roof was dilapidated to such an extent, that it was idle to attempt to repair it—a mere waste of money; the chimney stacks were dangerous, and the water came through into the upper rooms, and the house therefore was uninhabitable as it stood at the time when the tenant for life came into possession. The question I have to decide is whether this placing of a new roof—I use neutral language—on a house, not necessarily the mansion-house, is "an addition" or "alteration" within the meaning of sect. 13, sub-sect. ii. That the work was an improvement and for the benefit of the settled land there is no question: that it was not merely a work of repair is equally incontestable; but it is said on behalf of the trustees that, after all, the house was neither added to nor altered, and if this is correct, then the case is not within the section.

Every case of this kind must be considered in accordance with its circumstances, and the present is not a case of an attempt by

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the tenant for life to get something he is not entitled to at the expense of the inheritance; that of course is in his favour.

Then a question of a metaphysical nature arises as to the identity of the house. Is a house with a rotten roof identical with the house it becomes, when the roof has been replaced by a new and sound one? The Respondents, the trustees, say it is; that after all it is the same house; speaking strictly I should say that it was not the same house. The old roof let the water through into the bed-rooms, the new roof does not, and anyone who had lived in the house as it was before this alteration was carried out, on going back to it afterwards, and finding it thoroughly dry, would at once say it was not the same house. However, it is not necessary to have recourse to such reasoning as this, or to put such a very strict construction on this sect. 13, sub-sect. ii., neither are cases on covenants to repair in a lease of much assistance in determining the question, though it has been pointed out that these covenants must be construed with reference to the state of the buildings at the time of the demise, and that a landlord has no right to expect to get a new house in the place of an old one: *Payne* v. *Haine* (1). The result therefore is, that I come to the conclusion that the placing of a new roof on this house, in substitution for that which for all practical purposes was not a roof at all, is an alteration to the building within the meaning of sect. 13, sub-sect. ii. This is a fair construction as between the tenant for life and the inheritance, there being no question that the alteration (if an "alteration" within the section) was reasonably necessary and proper to enable this house to be let. For these reasons I will allow the amount expended on the re-roofing.

Solicitors: *Waterhouse, Winterbotham, Harrison, & Harper.*

(1) 16 M. & W. 541.

W. C. D.

*In re* PRATT.
PRATT *v.* PRATT.

[1893 P. 1938.]

NORTH, J.
1894
*Jan.* 11, 12.

*Will—Construction—Demonstrative or Specific Legacy.*

Legacy of "800 pounds invested in 2½ Consols" in a will where the context had some bearing on the point held specific, not demonstrative. *Mytton* v. *Mytton* (1) considered.

THIS was an originating summons to have several questions on the construction of the will of *Frances Pratt* determined.

The testatrix was a widow; she died in March, 1892, having made a will executed in the previous June. The will was in her own handwriting. The first part of the operative part of the will (except as to spelling) was as follows:—

"I give and bequeath to my son *William Pratt* five shares in the *London and County Bank* also twenty pounds a year from property at *Singleton* to be paid quarterly left in trust. To my son *Richard Pratt* I give and bequeath five shares in the *London and County Bank* also twenty pound per year from property at *Singleton* left in trust. To my daughter *Charlotte* I give and bequeath 800 pounds invested in 2½ Consols and fifteen pounds from property at *Singleton* but should the foresaid *Charlotte Pratt* marry her husband to have the interest on the 800 as long as he lives if children then the money from the *Singleton* property fifteen pounds to be invested for them and at the death of their father to be equally shared left in trust if no children the money to go back to the *Pratt* family." The testatrix gave a legacy of £500 to her daughter *Elizabeth Burch*, "also 700 pounds invested in 2½ Consols and fifteen pounds per year from property at *Singleton* her husband *Charles Burch* to have the interest on the 700 pounds as long as he lives and the fifteen pounds from the *Singleton* property to be invested for her children and at death of their father to be equally shared left in trust." She also bequeathed to her grandson *William*

(1) Law Rep. 19 Eq. 30.

NORTH, J.
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*John Henry Camp* "800 pounds invested in 2½ Consols" made subject to trusts for his benefit. After payment of debts, she bequeathed her residue.

The testatrix had not, either at the date of her will or at the time of her death, any 2½ per cent. Consols. She had at the date of the will, standing in the name of her deceased husband and herself, a sum of £1800 2¾ per cent. Consols which belonged to her beneficially. The Consols were at the date of her death still standing in the names of her deceased husband and herself. A week before her death she had instructed her bankers to sell £1200, part of the Consols; but, owing to the *Bank of England* requiring proof of her husband's death before issuing a form of power of attorney, the Consols had not been sold. The testatrix had real estate at *Singleton* more than sufficient in value to provide for all legacies payable from property at *Singleton*. One of the questions raised by this summons was whether the respective legacies of £800, £700, and £800 respectively expressed to be invested in 2½ per cent. Consols had or had not taken effect to any and what extent.

*Curtis Price*, for *Charlotte Pratt*, the Plaintiff to the summons:—

The several sums of £800, £800, and £700 "invested in 2½ Consols" are demonstrative, not specific. The intention of the testatrix was clearly to give those sums whether she had sufficient Consols to meet the legacies or no. The case is exactly covered by *Mytton* v. *Mytton* (1), where the words were, "the sum of £3000 invested in Indian security"; the prefix, "the sum of," cannot affect the construction in this respect.

*Wright Taylor*, for persons interested in the residue:—

It is conceded that the gift of 2½ per cent. Consols is sufficiently answered by the 2¾ per cent. *Goschens* owned by the testatrix, and that the three legacies do not fail: *Door* v. *Geary* (2); but the legacies are specific, and must abate. The words "invested in" can point only to the testatrix's own investments, and are equivalent to the word "my."

Unless *Mytton* v. *Mytton* can be distinguished upon the ground

(1) Law Rep. 19 Eq. 30. (2) 1 Ves. Sen. 255.

that the phrase "Indian security" is too indefinite to form the subject of a specific legacy, it is submitted that the decision is wrong. It goes far beyond the cases cited in support of it. *Gillaume* v. *Adderley* (1) is distinguishable. *Robinson* v. *Addison* (2) and *In re Gibson* (3) are no authorities for the decision. *Parrott* v. *Worsfold* (4), which seems to have been mainly relied upon, can no longer be considered as law: *Bothamley* v. *Sherson* (5).

There is a series of decisions in conflict with *Mytton* v. *Mytton* (6). *Page* v. *Young* (7), and the recent case of *McClellan* v. *Clark* (8), are indistinguishable from the present case. I rely as well on *Morley* v. *Bird* (9), *Hosking* v. *Nicholls* (10), and *Gordon* v. *Duff* (11).

Upon the whole of the will, it is clear that the testatrix intended to give the identical Consols she herself held.

*Seddon*, for *William John Henry Camp.*

*Wihl*, for other parties.

NORTH, J.:—

Questions like this, as to whether a legacy is demonstrative or specific, are very often difficult to answer; and I do not think it is by any means clear in this will: but the conclusion I come to is that there is a specific legacy in each case of the Consols. One thing that weighs with me strongly is the fact that these three gifts of Consols are throughout the will associated with a number of other gifts which are, as to three or four of them, clearly specific; as to three others—the gift of certain sums out of rents—it is more difficult to say they are specific, strictly speaking; but they are not general legacies, most certainly; and they are not demonstrative legacies, because if the *Singleton* property did not produce the total amount of these

(1) 15 Ves. 384.
(2) 2 Beav. 515.
(3) Law Rep. 2 Eq. 669.
(4) 1 Jac. & W. 594.
(5) Law Rep. 20 Eq. 304.
(6) Law Rep. 19 Eq. 30.
(7) Ibid. 501.
(8) 50 L. T. (N.S.) 616.
(9) 3 Ves. 628.
(10) 1 Y. & C. Ch. 478.
(11) 28 Beav. 519; 3 D. F. & J. 662.

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sums, the deficiency could not be made up from the general estate; and these gifts, therefore, of particular sums out of the income of the *Singleton* property, I will not say are specific legacies, but are something in their nature very like specific legacies. The result, then, is this, that in all the cases where particular gifts are given by way of legacy they are either themselves specific, or something very like specific bequests; that is an ingredient that I cannot ignore.

Then to deal with these gifts: I will take the first of them, because I can draw no distinction between the three. The first is this: "I give and bequeath £800." Now, supposing it stopped there, of course that would be a general legacy; but something more is added; it is "£800 invested in 2½ per cent. Consols." What does that mean? What are those words put there for? They must be put there for some particular purpose. The question is, What purpose? If it is to be a general legacy, it does not matter where it is invested. It would be a legacy payable out of the general estate. If it were a demonstrative legacy, it would be "£800 paid out of my estate in any event, but preferably out of the 2½ per cent. Consols." But it is singular, if this is what is meant, that the phrase should not be used. As it is, I find "£800 invested in 2½ per cent. Consols." If it was £800 lent to somebody in particular, it would be a specific bequest of that particular sum. If it was "£800 in the bag in my room," that would be a specific £800; and not the less so if there was more than £800 in the bag. And so here, "£800 invested in 2½ per cent. Consols" seems to me to be adding some description to the term £800, and to be used for the purpose of shewing that what is given is £800 in Consols, and not £800 generally.

Therefore, looking at these words as used, I should say that they meant, *primâ facie*, "£800 invested at the present time in Consols," or "invested at my death in Consols" (it would not matter which so far as this question goes), and did not mean £800 generally. And that is the conclusion I should come to on the will independently of cases. But I think the cases are all in favour of the same view. When I say all, I shall have a word to say about *Mytton* v. *Mytton* (1) presently; but the cases which

(1) Law Rep. 19 Eq. 30.

Mr. *Wright Taylor* mentioned all seem to me to go in that direction.

First of all, let me refer to *Gillaume* v. *Adderley* (1). In the first place there was a clear specific legacy of £3348; upon which the Lord Chancellor remarked as shewing the distinction between a clear specific legacy and one with reference to which there is a doubt whether it is or is not specific. And then, when we come to look at the other legacy, it was a gift of a sum of £5000 sterling or 50,000 current rupees. Of course, that is a general legacy. The sum is referred to several times in the same general way, and the only reason for saying that it was not a general legacy is that in one passage there was a direction "that the said sum of £5000 sterling or 50,000 current rupees now vested in the company's bonds be remitted to *England* as opportunity may or shall offer." It was said that that was sufficient to make the legacy specific. I do not see that that follows at all; it was merely a general legacy followed by a direction that something was to be done for the purpose of securing it. But that does not in any way make it a specific legacy. The language in that case was very different from that in the present.

Now to look at the other cases, I will take first *Page* v. *Young* (2). There there was a gift to the testator's sister of "the interest of £4500 money in the funds for her absolute use and benefit," followed by specific gifts to the same legatee, and the words "and at her decease the funded property to *H. Y.*" The testatrix had at that time an absolute interest in a somewhat smaller sum of Consols. The fact that it was smaller was unimportant except that it would reduce the amount of the legacy. It was held that the bequest of the interest of £4500 money in the funds was a specific bequest for life of the Consols the testatrix had at her death. "The sum of £4500 money in the funds" is a very similar phrase to that used in the present case.

Then in *Hosking* v. *Nicholls* (3) the gift was "the sum of £4000 capital stock in the Three per Cents. or in whatever of the Government funds the same should be found invested." That was held

(1) 15 Ves. 384. (2) Law Rep. 19 Eq. 501.
(3) 1 Y. & C. Ch. 478.

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to be a specific legacy, and the words were very like the present words—though it will be noticed that the word "invested" was not used in immediate connection with the Consols, but in reference to other funds wherein the money should be invested. That is speaking of the £4000 capital stock in the Consols as being an investment: and is as near as possible to the present case. Again, in *Morley* v. *Bird* (1) the gift was of "four hundred pounds out of seven, now lying in the Three per Cent. Consolidated." It is very hard to see any real distinction between the phrase "now lying in Consolidated" and "invested in Consols." Again, in *Gordon* v. *Duff* (2), the phrase was "the sum of £2000 Long Annuities" in two legacies. In each case the bequest was of "the sum of £2000 Long Annuities standing in my name in the books of the Governor and Company of the *Bank of England.*" Each bequest was held to be specific and not demonstrative; and the Lord Chancellor, after speaking of the impossibility of altering, or the impropriety of attempting to alter, the construction of the words used in the will, points out that evidence might be admitted to explain, though not to control, the language—to aid, though not to vary or alter, the construction of the words. Further on he says: "Now in this case it would be to control, vary, and alter the meaning to say that '£2000 Long Annuities standing in my name' means the sum of £2000 sterling, to be paid out of Long Annuities standing in my name, or £2000 sterling to be invested in Long Annuities." So here it is "£800 invested in 2½ per cent. Consols," and it would be altering that phrase entirely to say "£800 to be paid out of the Consols standing in my name." Then, again, the latest case cited, *McClellan* v. *Clark* (3), seems to me to be very much in point also. In that case there was a direction that the trustees should "stand possessed of the sum of £1500, now invested in the *Bombay, Baroda, and Central India Railway Company,*" upon certain trusts, and those words really are indistinguishable from those in the present case. Mr. Justice *Pearson* said, as I say, that these questions as to whether a legacy was specific or demonstrative were always doubtful, and different minds might

(1) 3 Ves. 628. (2) 3 D. F. & J. 662.
(3) 50 L. T. (N.S.) 616.

arrive at different conclusions. He would not fix any definition; but he came to the conclusion without hesitation that it was a bequest of a specific fund, and not a general legacy of £1500.

Then the only other case is *Mytton* v. *Mytton* (1), where the gift was this: "I give and bequeath all my money which shall be out at interest, invested in the funds, or otherwise secured at my decease, upon trust, in the first place, to pay thereout all my just debts, and funeral expenses, and testamentary expenses, and, in the next place, to pay to my nephew, *Henry Whitehead Mytton*, the sum of £3000 invested in Indian security, my said nephew, *Henry Whitehead Mytton*, to enjoy the interest of the same during his lifetime," and at his death the same was to go over in the way directed by the will. At the date of her will the testatrix had £3000 invested in Indian securities: which were paid off before her death. The question was whether that bequest was was specific or not. The Vice-Chancellor came to the conclusion that in that case it was not. He went upon the whole construction of the will; and far be it from me to say that he was not right in the conclusion he came to. I can see that there is a great deal of difference—or, at least, it occurs to me that there is a difference—in the case of a gift where you have the words "the sum of £3000." It may be taken there to indicate that the testator is dealing with a specific sum, and that is the sum the legatees are to take: and the reference to the investment is merely a secondary consideration. In the present case the words "the sum" are not found here; and although I do not rely altogether upon the omission of those words as distinguishing the two cases, yet it seems to me that it would be much stronger to say that a gift of "a sum of £800 invested in Indian securities" is specific, than to say that "£800 invested in Consols" is specific. It seems to me that the investment is more a part of the description of the £800 in this case, than in a case where there is a separate reference to the sum itself as the object of the gift, the question of the investment being, as I say, a secondary consideration. How far that was one of the circumstances that influenced the Vice-Chancellor I do not know;

(1) Law Rep. 19 Eq. 30.

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but I do not consider that in the view which I am taking I differ from that case. But if there is no distinction between the two, then it seems to me that I am bound to follow the several cases which I have already referred to, as far as cases can be a guide as to the construction of the present will.

If the will is to be construed on its own merits, independently of cases, I certainly come to the conclusion that what was meant here is that the testatrix was apportioning out what she believed to be the sum of Consols which she was able to dispose of among her several legatees in the proportions mentioned here; and I cannot explain how it is—no one can explain how it is—that she professed to dispose of the amount of £2300 when she only had £1800. But I am not satisfied from reading the will that she did consider that she had at the time £2300 Consols to dispose of in this way. It may be that she knew exactly what she had, and that she intended to buy more to make up the difference. I cannot tell. But upon the will itself, independently of authorities, and looking at the other dispositions made by the will, the conclusion I come to is that she intended to divide Consols among these legatees of Consols, and that the legacies to them were specific legacies.

Solicitors: *J. J. Harlow*, agent for *A. Gregory, Chichester.*

D. P.

NORTH, J.

1894

Feb. 2.

## *In re* BEENY.
## FFRENCH *v.* SPROSTON.

[1893 B. 6047.]

*Practice—Order for Payment of Money into Court—Admission by Defendant—Verbal Admission—Rules of Supreme Court,* 1883, *Order* XXXII., *r.* 6.

A defendant may be ordered to pay into Court money which he has verbally admitted to be in his hands or under his control.

Upon a motion that a Defendant might be ordered to pay into Court a sum of money which he had verbally admitted to be in his hands or under his control, an affidavit proving the admission was made by a clerk of the Plaintiffs' solicitors. A copy of the affidavit was served on the Defendant with the notice of motion, which stated that the affidavit would be read on the hearing of the motion. The Defendant did not answer the affidavit, and he did not appear on the hearing:—

*Held*, that the Defendant must be ordered to pay the money into Court.

MOTION by the Plaintiffs that the Defendant (who was the sole surviving executor and trustee of the will of *Samuel Beeny* deceased) might be ordered, within seven days after service of the summons upon him, to pay into Court to the credit of the action, to an account to be entitled, "The account of the share of the Plaintiff *Frances Clara Ffrench* and her children in the testator's residuary estate," the sum of £535, admitted by the Defendant to be the amount of that share and to be uninvested, and as to part thereof to be in a bank, and as to the residue thereof to be in his own hands, together with interest thereon from the 25th of December, 1892, to the day of payment.

The notice of motion gave a list of certain affidavits which it stated would (amongst others) be read on behalf of the Plaintiffs on the hearing of the motion, and copies of these affidavits were served on the Defendant personally with the notice of motion. The Defendant did not answer the affidavits, and he did not appear on the hearing of the motion. The Plaintiffs' claim (indorsed on the writ) was (1.) to have the one-fifth share of the residuary real and personal estate of the testator, devised and bequeathed to his daughter *Anne Elizabeth Beeny*, deceased, and

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the Defendant, upon trust for the Plaintiff *Frances Clara Ffrench*, for life, and after her decease, for her children, ascertained; (2.) to have the testator's estate administered and the accounts relating thereto taken on the footing of wilful default; (3.) that the Defendant might be removed from the office of trustee of the testator's will, and that two new trustees thereof might be appointed; (4.) payment by the Defendant to the new trustees when so appointed, or into Court, of the said one-fifth share of the testator's real and personal estate; (5.) payment by the Defendant to the Plaintiff Mrs. *Ffrench* of all arrears of income of the said one-fifth share of the testator's estate.

One of the affidavits mentioned in the notice of motion as to be read on the hearing of the motion was a joint affidavit by *W. S. Cottrell*, the Plaintiff's solicitor, and *J. H. Frost*, his clerk. *Frost* deposed that on the 17th of November, 1893, the Defendant called upon him at *Cottrell's* office (in the absence of *Cottrell*) and "I pressed the Defendant for information as to the security upon which the trust fund was invested, and he admitted that the said trust fund (the Plaintiffs' share of which he said amounted to about £535) was not invested, but that a portion of it was in a bank, and the remainder was in his own hands." *Cottrell* deposed: "On the 23rd of November, 1893, the Defendant called on me, and it was then arranged that he should appoint new trustees of the Plaintiffs' share of the trust fund, and he promised that he would pay the amount of principal and income within a few days. On the 5th of December, 1893, the Defendant again called upon me, and stated that he had been unable to obtain the money to pay to the proposed new trustees, being the share of the Plaintiffs in the trust fund; but he promised that he would pay the amount at the end of the month. I demurred to that, and he then stated that he would endeavour to find the money, and let me have a cheque the following Tuesday."

The Defendant did not fulfil his promise, and on the 22nd of December the writ was issued, and it was served on the Defendant the next day.

*S. B. L. Druce*, for the Plaintiffs:—

There is an admission by the Defendant that £535, the amount

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of the Plaintiffs' share of the testator's estate, is in his hands or under his control, sufficient to enable the Court to order him to pay that amount into Court. A verbal admission is enough when it is clearly proved, as it is here, that it has been made. The Defendant has not ventured to contradict the Plaintiffs' evidence. According to rule 6 of Order XXXII., the admission may be made "by the pleading or otherwise." That a verbal admission is sufficient is shewn by *Freeman* v. *Cox* (1); *London Syndicate* v. *Lord* (2); *Hampden* v. *Wallis* (3); *Porrett* v. *White* (4). The authority of these cases has not been shaken by the observations of the Court of Appeal in *Hollis* v. *Burton* (5). It is quite consistent with those observations that the Court should act on an oral admission. Copies of the affidavits were served on the Defendant with the notice of motion, and he was told that they would be read on the hearing of the motion, and yet he has not attempted to contradict them.

The Defendant did not appear.

NORTH, J.:—

Having regard to what was said by the Lords Justices in *Hollis* v. *Burton*, I do not think that they intended to overrule the previous cases which have been referred to by Mr. *Druce*, and I think that those cases are sufficient authority for holding that money may be ordered to be paid into Court upon an admission by a defendant, even though the admission was made verbally, and is not contained in any written document. No doubt, if the alleged admission is only verbal, there is more difficulty in treating it as sufficient, if there be any dispute as to the fact of its having been made. But here there is no contradiction by the Defendant, though his attention was specially directed to the alleged admission by means of the affidavits which were served on him, and the statement in the notice of motion that those affidavits would be read on behalf of the Plaintiffs on the hearing of the motion. I think that, having regard to *Freeman* v.

(1) 8 Ch. D. 148.
(2) Ibid. 84, 90.
(3) 27 Ch. D. 251.
(4) 31 Ch. D. 52.
(5) [1892] 3 Ch. 226.

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*Cox* (1) and *London Syndicate* v. *Lord* (2), I am bound to say that there has been a sufficient admission by the Defendant to justify me in ordering him to pay the amount mentioned into Court.

But the claim indorsed on the writ contains no reference to an administration of the testator's estate as regards the particular share of the Plaintiffs. The Plaintiffs only ask for a general administration of the estate for the purpose, no doubt, of ultimately ascertaining what is the amount of the one-fifth share to which they are entitled, but no immediate claim is made as regards that one-fifth share.

Then, reading the Defendant's admission, if the words "the Plaintiff's share of which he said amounted to about £535," are omitted, it is quite clear that no order could be made for payment into Court. Now, adding those words, which contain the only reference in the admission to any particular sum, I think they amount to a sufficient admission to enable me to order the sum of £535 to be brought into Court. But I decline to give the Plaintiffs the benefit of securing that particular sum for themselves, or to exclude the other beneficiaries from the opportunity of sharing in it.

I order the money to be paid in expressly to the general account of the testator's estate, and not to the account of the Plaintiffs' share. The costs of the motion will be costs in the action.

Solicitors: *Gamlen & Burdett*, agents for *Cottrell & Son, Birmingham.*

(1) 8 Ch. D. 148. (2) 8 Ch. D. 84, 90.

W. L. C.

## *In re* TAYLOR, SONS, & TARBUCK.

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Feb. 2.

*Solicitor—Costs—Taxation—Abortive Order of Course—Right to obtain second Order of Course.*

On the 24th of October, 1893, a client obtained the common order of course to tax a bill of costs, which had been delivered to him by his solicitors on the 10th of May, 1893, and also to tax another bill alleged to have been delivered on the 27th of October, 1892. On the 29th of November, 1893, the Taxing Master gave notice that he had fixed the 7th of December for the taxation. The parties attended on that day, and the Taxing Master then held that the alleged bill of the 27th of October, 1892, was not really a bill of costs, but was only a list of disbursements, and that, as the order directed him to tax two bills, and there was in fact only one, he could not under the order tax that one. On a subsequent application to tax the solicitors' costs of the abortive order, the Master held that the order had become inoperative, because he had not extended the time fixed by the order for the making of his certificate, and that he had no jurisdiction to order the client to pay the costs of the proceedings. But he intimated that it would be fair for the client to pay the solicitors £2 2*s*. The solicitors then acting for the client afterwards offered to pay that sum, and, while the original solicitors were considering whether they would accept the offer, a second order of course was obtained to tax the bill of the 10th of May, 1893. This order was obtained without any mention of the former order. On a motion by the solicitors to discharge this order:—

*Held*, that the order had been irregularly obtained, and that, after the first order had become abortive, the client was not entitled to obtain another order to tax the bill, except upon a special application and on the terms of paying the solicitors' costs of the former proceedings.

The order was not, however, discharged; but the Judge directed the Taxing Master to proceed under it to tax the bill, and also to tax the solicitors' costs of the former proceedings, and to bring those costs into account.

MOTION by Messrs. *Taylor, Sons, & Tarbuck*, solicitors, to discharge an order of course, dated the 8th of January, 1894, for the taxation of a bill of costs which they had delivered on the 10th of May, 1893, to a client named *C. H. Fairclough*.

On the 24th of October, 1893, *Fairclough* obtained an order of course for the taxation of a bill of costs, alleged to have been delivered to him by the solicitors on the 27th of October, 1892, and of the bill delivered to him on the 10th of May, 1893. The

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order contained the following clause: "It is ordered that no proceedings be commenced against the Petitioner in respect of the said bills pending this reference, but the Master is to make his certificate in a month (unless the said Master shall extend the time to enable him to make his certificate), or this order is to be of no effect."

On the 27th of October, 1893, the Petitioner's solicitors obtained a reference to Mr. *Shearme*, one of the Taxing Masters, to tax the bills. The next day they left a copy of the order at the Taxing Master's chambers, and on the 29th of November, 1893, they received a notice from the Taxing Master that he had fixed the 7th of December, 1893, for the taxation of the bills. The solicitors of both parties attended the taxation on that day. The Respondent's solicitors raised the preliminary objection that the bill alleged to have been delivered on the 27th of October, 1892, was not really a bill of costs, but was only a list of disbursements. The Taxing Master held that this document was not a bill, and he also held that he could not tax the bill dated on the 10th of May, 1893, because the order directed him to tax two bills, and he could not carry it out when only one bill existed. On the 19th of December, the solicitors on both sides again attended before the Taxing Master, and he decided that the order had become inoperative, because he had not extended the time for making his certificate, as required by the order. The Respondent's solicitors then asked for an order for the payment by the Petitioner of the Respondent's costs of the petition and subsequent proceedings. The Taxing Master held that he had no jurisdiction to make such an order. But he expressed an opinion that it would be fair for the Petitioner to pay the Respondent's costs, and that £2 2*s.* would be a proper sum to pay.

On the 21st of December, Messrs. *Torr & Co., Faircloughs' London* agents, wrote to Messrs. *Blake & Heseltine, Taylor & Co.'s London* agents, offering to pay the £2 2*s.* suggested by the Taxing Master. On the 22nd of December, *Blake & Heseltine* replied that they would write to their clients, inquiring if they would accept £2 2*s.* in settlement of their costs of the abandoned order. No further letter was received by *Torr & Co.*, and on

the 8th of January, 1894, they obtained a second order of course for the taxation of the bill which was delivered on the 10th of May, 1893. This order was obtained without any mention being made of the prior order of course.

The second order was that which *Taylor & Co.* now moved to discharge.

*Wurtzburg*, for the motion:—

After the client had obtained one order of course to tax the bill of May, 1893, and that order had become abortive, the month limited having expired, and the time not having been extended by the Master, it was irregular to obtain a second order of course, suppressing the first order: *In re Webster* (1). The client's remedy by order of course was exhausted, and he ought to have made a special application on notice to the solicitors. The effect of the first order was to prevent the solicitors during the month from taking any proceedings to recover their costs.

*H. M. Humphry*, for the client:—

No objection is made to the order to tax; the objection is only that the client ought to have adopted a more expensive procedure to obtain it. When the Taxing Master fixed the 7th of December for the taxation, he in effect extended the time for making his certificate. Both parties attended on that day, and the objection that the time had expired was not raised. The client could not fix the day for taxation; the day was fixed by the Taxing Master himself.

[NORTH, J.:—The month had expired then; what jurisdiction had the Taxing Master to fix a day then?]

We offered to pay the sum which the Taxing Master thought sufficient for the costs of the proceedings under the first order.

NORTH, J.:—

In October, 1893, an order of course was obtained by a client to tax what were described as two bills of costs of his solicitors.

(1) [1891] 2 Ch. 102.

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Some delay took place in the Taxing Master's Office, and, after the month limited for the making of the certificate had expired, and the Master had no jurisdiction to proceed under the order, he fixed the 7th of December for the taxation. When the parties attended before him on the 7th of December, his attention was called to the fact that one of the documents which he was ordered to tax was not a bill of costs at all, but only a list of disbursements, and he said that he could not act on the order at all. On a later day a question was raised as to the costs of the proceedings, and the Taxing Master said that, the time having expired, he had no jurisdiction to deal with the costs. But he expressed an opinion that £2 2*s.* would be a proper sum to be paid by the client to the solicitors for their costs of the abortive proceedings. On the 21st of December, the client's *London* agents wrote to the solicitors' *London* agents, offering to pay the £2 2*s.* which the Taxing Master had suggested, if the solicitors would accept it in full discharge of their claim for costs of the abandoned order. The solicitors' *London* agents answered that they would consult their principals, whether they would accept the offer. This was a perfectly right thing to do; but in fact no further letter was sent in reply to the offer. Unfortunately, the clients' *London* agents did not write again to inquire whether the £2 2*s.* would be accepted; but they took the law into their own hands, and obtained *ex parte* a second order of course to tax the bill of the 10th of May, 1893, thus again suspending the solicitors' remedy for a month. It is not suggested that in so doing the client's *London* agents were guilty of any bad faith; but, in my opinion, they made a serious mistake in practice. By means of the first order of course they suspended for a month the solicitors' remedy for the recovery of their costs, and then, when that order had become abortive by effluxion of time, they obtained *ex parte* the second order of course to tax the bill. In my opinion, in so doing they were entirely wrong. I do not mean to say that the right of taxation had been lost; but it ought not to have been exercised by means of an order of course. An order to tax the bill could have been obtained on a special application. The order upon such an application would not have been precisely the same order as that which was actually obtained,

for it would, no doubt, have imposed the terms of the Applicant's paying the solicitors' costs of the first order. As regards the taxation the order would no doubt have had the same effect as the order which was obtained, but it would have been made upon the terms which I have mentioned. It is said that this is a mere technicality, because the client had offered to pay the solicitors' costs of the first order. But that is not so. A certain sum had been offered in full discharge of the costs, and, while the solicitors were considering whether they would accept the offer, the second order of course was obtained. In my opinion, the client was not entitled to obtain a second order to tax the bill, except upon a special application, notice of which had been served upon the solicitors; and upon his informing the officer of the Court that he had obtained the former order, and that it had lapsed. I do not, however, think it is necessary now to put the parties to the expense of obtaining a fresh order. I shall direct the Taxing Master to proceed to tax the bill under the existing order, and also to tax the solicitors' costs under the first order, and of the present motion; and those costs will be brought into account.

Solicitors: *Blake & Heseltine*, agents for *Taylor, Sons, & Tarbuck, Wigan; Torr & Co.*, agents for *H. J. Longton, Warrington.*

W. L. C.

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Jan. 30, 31,

# MAYFAIR PROPERTY COMPANY *v.* JOHNSTON.

[1893 M. 1370.]

*Partition—Tenants in Common—Party Wall—Trespass—Mandatory Injunction—Reversioner.*

Notwithstanding the abolition of the writ of partition a tenant in common is entitled as of right to a partition of the property held in common, subject to the provisions for a sale contained in the *Partition Act*, 1868.

Order made at the instance of one of two tenants in common, against the wish of the other, for the partition, vertically and longitudinally, of a wall which separated the gardens of two adjoining houses.

The occupiers of a house and garden, No. 37, pulled down and rebuilt a wall which separated the garden from that of the adjoining house, No. 36, and in doing so they trespassed on the garden of No. 36 by placing in the soil of it foundations and footings of the new wall extending further into that garden than did those of the old wall. The house No. 36 was in the occupation of a tenant under a lease:—

*Held*, that, the trespass being of a permanent nature, the owners of the reversion in fee in No. 36 could, though the tenant made no complaint, maintain an action in respect of the trespass.

TRIAL of action for the partition of a wall of which the Plaintiffs and the Defendants were tenants in common in equal undivided moieties.

*The Freehold and Leasehold Investment Company* (one of the Plaintiffs) were the owners in fee simple of a house and premises No. 37, *Hyde Park Gate*, in *Middlesex*. The other Plaintiffs, the *Mayfair Property Company*, were the lessees of the house and premises, under a building agreement dated the 24th of November, 1892. The Defendants *William St. Aubyn* and *R. E. Johnston* were the owners in fee of the adjoining house and premises No. 36, *Hyde Park Gate*, subject to a mortgage thereof in favour of the Defendants *F. J. Johnston* and *R. E. Johnston*. The other Defendants were *Isabella Lewis* (widow) and *F. T. Lewis*, who were the executors of Sir *C. E. Lewis*, deceased, to whom a lease of the house and premises No. 36, for a term of fourteen years, had been granted in October, 1886. Both the houses were situate on the south side of the street, No. 36 being to the east of No. 37.

The wall in question divided the gardens at the rear of the two houses respectively. It was originally 6½ feet high and 9 inches in thickness. In March, 1893, the *Mayfair Company* pulled down the house No. 37, with the view of rebuilding it on a larger scale. In the course of their operations they, without the consent of the Defendants, pulled down 33 feet of the garden wall. The Defendants commenced an action in the Chancery Division against the *Mayfair Company*, in which, on the 21st of April, 1893, Mr. Justice *North* granted an injunction, perpetually restraining the *Mayfair Company* from pulling down or otherwise interfering with the wall in derogation of the rights of the then Plaintiffs as tenants in common with the *Mayfair Company* of the wall; but this injunction was not to prevent the *Mayfair Company* from restoring the portions of the wall removed by them to the condition in which the same were prior to the wrongful acts of the company. The *Mayfair Company* proceeded to rebuild the part of the wall which they had pulled down, not as it stood before as a mere garden wall, but they rebuilt it as part of the wall of their new house, which they carried up to a height of 50 feet or more. The company placed in the soil of the garden of No. 36 concrete foundations and footings which extended into the Defendants' garden some inches further than the foundations and footings of the old wall did. It was admitted that in so doing the *Mayfair Company* had committed a trespass. At the height of 6½ feet from the level of the ground the *Mayfair Company* set back their new wall to the west 4½ inches, so that that half of the new wall which adjoined the garden of No. 36 was, from the height of 6½ feet above the ground level, left unbuilt upon. The Defendants moved to commit the *Mayfair Company's* architect, and to sequestrate the property of the company, for a breach of the injunction, but the motion stood over to enable the present Plaintiffs to bring an action for the partition of the garden wall. This action was then commenced. The Plaintiffs claimed a partition of the wall under the direction of the Court. The executors of Sir *C. Lewis* did not deliver a defence.

The other Defendants by their defence said that the owners of each of the houses and premises had an interest in keeping the

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wall dividing the houses and premises intact and undivided. They denied that the wall or any part thereof was a subject-matter which was divisible, or which it was expedient or desirable should be partitioned. They said that the new wall was not a restitution of the garden wall, which had been improperly pulled down, and that the new wall ought to be removed and ought not to be partitioned. They submitted, that, if the wall were partitioned, they would be entitled to remove so much of it as might be allotted to them, and, further, that they were entitled to remove the concrete foundations and footings which had been placed by the *Mayfair Company* in and upon the garden of No. 36.

They also delivered a counter-claim to which the executors of Sir *C. Lewis* were not made parties.

By their counter-claim they claimed:—

(1.) An injunction to restrain the Plaintiffs from permitting the new concrete foundations and footings to continue in and upon the Defendants' land.

(2.) A declaration that the Plaintiffs were not entitled to lateral support for their new building from the adjacent soil of the Defendants.

(3.) Damages for the wrongful acts of the *Mayfair Company.*

In their reply the Plaintiffs said that the new concrete foundations and footings were proper, and were properly laid in accordance with the requirements of the *Metropolitan Building Acts* and the bye-laws thereunder. They said that a portion of the wall of the new building rested upon 4½ inches of the garden wall, on the side thereof adjoining No. 37, but that no portion of the new wall was built above or upon that moiety of the garden wall which adjoined the garden of No. 36. In answer to the counter-claim the Plaintiffs said that they did not claim to be entitled to any additional lateral support from the adjacent soil of the Defendants for or in respect of any additional weight of the new buildings on the Plaintiffs' premises.

*Swinfen Eady*, Q.C., and *Peterson*, for the Plaintiffs:—

Apart from the *Partition Act*, which enables the Court to direct a sale of property held by tenants in common, the statutes

31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, gave a tenant in common a right to compel a partition. Though the old writ of partition has been abolished by the Act 3 & 4 Will. 4, c. 27, s. 36, that right still remains: *Griffies* v. *Griffies* (1); *Cubitt* v. *Porter* (2).

[NORTH, J., referred to *Turner* v. *Morgan* (3).]

In *Watson* v. *Gray* (4) Mr. Justice *Fry* expressed an opinion that a wall could be partitioned, though there is no reported case in which this has been done. Neither party desires a sale. The counter-claim is not maintainable by the owners of the fee, who are only reversioners subject to the lease to Sir *C. Lewis.* His executors are not parties to the counter-claim. The counter-claim is in effect an action of trespass, and the lessees who are in possession of No. 36 make no claim. The reversioners might have obtained an injunction to prevent the building, but, not being in possession of the land, they cannot obtain a mandatory injunction, which would authorize and compel the Plaintiffs to enter on land in the possession of some one else. Time would not run against the reversioners, so long as they are not in possession. It is not like an interference with light, because in that case an indefeasible right would be acquired in time under the *Prescription Act.*

[NORTH, J., referred to *Cooper* v. *Crabtree* (5).]

Even if the counter-claiming Defendants were in possession, they would not be entitled as a matter of right to a mandatory injunction. The Court would have a discretion in the matter, and might say, "You can remove the bricks and concrete yourselves": *Goodson* v. *Richardson* (6). The *Mayfair Company* had a right to pull down the old wall for the purpose of rebuilding it, provided that they were acting in good faith: *Cubitt* v. *Porter.*

[NORTH, J., referred to *Stedman* v. *Smith* (7); *Wiltshire* v. *Sidford* (8).]

The real objection of the Defendants is not to the Plaintiffs'

(1) 11 W. R. 943.
(2) 8 B. & C. 257.
(3) 8 Ves. 143.
(4) 14 Ch. D. 192, 195.
(5) 20 Ch. D. 589.
(6) Law Rep. 9 Ch. 221.
(7) 8 E. & B. 1.
(8) 8 B. & C. 259, n.; 1 M. & R. 404.

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trespass of a few inches, but to their having built at all. The Court has a discretion whether it will grant a mandatory injunction or damages in respect of a trespass. If damages were given the legal right to the land trespassed on would not pass to the Plaintiffs. They would not become purchasers of the land.

[NORTH, J., referred to *Krehl* v. *Burrell* (1).]

*Cozens-Hardy*, Q.C., and *Curtis Price*, for the Defendants, the reversioners:—

It is clear that a wilful and deliberate trespass was committed by the *Mayfair Company* and their architect. The wall was rebuilt only as part of the Plaintiffs' new wall; its identity has been lost: *Stedman* v. *Smith* (2). The Plaintiffs claim partition as a matter of right, but the old writ of partition has been abolished. The Court ought not to grant a partition when the effect of it might be to render the Plaintiffs' building a violation of the provisions of the *Metropolitan Building Act*, 1855 (18 & 19 Vict. c. 122), Sched. I., Preliminary, rule 8. If a partition is granted the Defendants will be entitled to remove their half of the wall and the footings and foundations which are on their land, and then the Plaintiffs' building will not have footings of the width required by the Act for a building of such a height. This Court will not do that which might lead to a violation of the law.

[NORTH, J:—Whether I grant a partition or not, the Defendants can remove the footings which are on their own land, and in either case the wall would not then be in accordance with the provisions of the Act.]

There would be a much more serious breach of the Act if half the wall were cut away. The wall would not then be of the thickness prescribed by the Act. Partition is not a matter of right, and the Court should here exercise its discretion in refusing it.

As to the counter-claim, the trespass being a permanent one, the reversioners are entitled to sue in respect of it. The Defendants have been ousted from the wall: *Stedman* v. *Smith*;

(1) 11 Ch. D. 146. (2) 8 E. & B. 1.

*Tucker* v. *Newman* (1); *Attorney-General* v. *Tomline* (2); *Goodson* v. *Richardson* (3). The present case is an *à fortiori* one, for in *Goodson* v. *Richardson* an injunction was granted, notwithstanding that the Defendant by reason of it might be made liable to a criminal prosecution for interfering with a highway.

*A. A. Hudson*, for the executors of Sir *C. Lewis*.

*Swinfen Eady*, in reply.

NORTH, J.:—

In my opinion the Plaintiffs are entitled to a partition. The Defendants oppose it, but I do not see on what legal ground that opposition can be based. The old statutes of *Henry* VIII. still provide for a partition being made between tenants in common, and recognise the right of the parties to it, and, although no doubt the means prescribed by those statutes, the common law writ of partition, was abolished by the Act 3 & 4 Will. 4, c. 27, s. 36, yet the procedure employed by Courts of Equity in decreeing partition shews either that the writ of partition was merely one mode of carrying out that which the statutes directed to be done, or that Courts of Equity have an independent power to decree partition. It does not matter on which of those two grounds they proceeded, because in fact Courts of Equity held as a matter of course that a tenant in common was entitled to have a partition made of the property which he held in common with others. The cases on the point are, I think, quite clear. They are many of them old, but they are none the worse for that, especially when one bears in mind that in the later cases the old ones are practically acquiesced in.

The first case which I have seen is *Parker* v. *Gerard* (4). The report, which is very short, is this: "On a bill for partition, Sir *Thomas Clarke*, M.R., said, that such a bill is matter of right, and there is no instance of not succeeding in it, but where [there] is not proof of title in plaintiff; and in the case of *Cartwright* v. *Lord Bath* [*vide Cartwright* v. *Pultney* (5)],

(1) 11 A. & E. 40.
(2) 5 Ch. D. 750, 761.
(3) Law Rep. 9 Ch. 226.
(4) Amb. 236.
(5) 2 Atk. 380.

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the Court gave leave, and time for the plaintiff to make out his title. In the case of Mr. *Baines* [*vide Warner* v. *Baynes* (1)], upon a bill for a partition of the cold bath, &c., the strongest arguments of inconveniency imaginable were used, but did not prevail. In *Nevis* v. *Levene*, the plaintiff was entitled to three or four hundred acres, and the defendant to four or five only; and though the defendant would have rather given up his part than be at the expense of a partition, yet it was decreed, 'and to be at the equal expense of both parties.'" The "case of Mr. *Baines*" there referred to is *Warner* v. *Baynes*. In that case there were manifestly very great inconveniences in giving effect to the application for partition, but Lord *Hardwicke* held on two occasions that difficulty in making a partition was no objection to ordering it. There are other cases to the same effect, the well-known case of *Turner* v. *Morgan* (2) being one. Then there is *Baring* v. *Nash* (3). There the question was, whether an owner in fee in reversion of one-tenth, not being a party, could be compelled to join in the partition. Sir *Thomas Plumer*, V.-C., said (4): "It is clear, the absolute owner of a tenth part may compel the owners of the other nine to concur with him; and there would be no objection from the minuteness of this interest, the inconvenience, or the reluctance of the other tenants in common, if no objection could be taken to the plaintiffs' title: partition being matter of right: whatever may be the inconvenience and difficulty."

I was referred to a more recent case, *Griffies* v. *Griffies* (5), before *Kindersley*, V.-C., in which the same law was incidentally laid down. It seems to me, therefore, that the right to a partition is clear.

Then the question is, how should it be carried out? I do not think it necessary to go through the form of an inquiry in Chambers. It is obviously the interest of the parties, as I understand them to desire, that the partition should be made by giving to the owners of the land to the west the western half of the wall, dividing it longitudinally, and to the owners of the

(1) Amb. 589.
(2) 8 Ves. 143.
(3) 1 V. & B. 551.
(4) Ibid. 554.
(5) 11 W. R. 943.

land to the east the eastern half of the wall. I am prepared, therefore, at once to direct that the partition shall be carried out in that way, and that proper mutual conveyances be executed for the purpose. So much for the action for partition.

Then there is a counter-claim by some of the present Defendants, and I understand that the motion in the former action for a sequestration and committal has now to be disposed of. I have not been reminded of any of the evidence which was given on that application; but I understand that I have only now to deal with the costs of that motion. The Defendants, by their counter-claim, ask for, "an injunction to restrain the Plaintiffs from permitting the concrete foundations and footings to continue in and upon the Defendants' land." The wall in question is a garden wall which, down to this time, has belonged to the parties as tenants in common. It has been suggested that one of them has an easement of support as against the other. In my opinion there is nothing of the kind. The wall and every part of the wall belonged to them as tenants in common; there is no ground for saying that there is any dominant or any servient tenement, or that any easement of support exists at present, whatever may be the case in process of time. That which has been common property down to the present time is now to be divided, and the parties are to become owners of separate parts of it, and each of them will have absolute control over that which will then be his own land. Each of them can deal with his own land as he pleases.

The counter-claiming Defendants ask me to restrain the Plaintiffs from permitting the concrete and bricks which they have placed upon the Defendants' land to remain where they are. It is not disputed by Mr. *Swinfen Eady* that a trespass has been committed. No doubt the trespass is underground; it has not been visible to the eye, but it has actually been committed. What is the effect of it? In my opinion, when the Plaintiffs went upon the Defendants' land, dug away the earth, and placed bricks and concrete upon the land, the effect was (I am not now speaking of the site of the old wall) to make a present of those materials to the Defendants. *Quicquid plantatur solo, solo cedit.* When the materials were placed there they became the

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property of the Defendants, and the Plaintiffs would not be entitled to remove them.

I have been asked in effect to grant a mandatory injunction, directing the Plaintiffs to enter upon the Defendants' land and remove these footings and foundations. I see no reason for doing this. There would be this difficulty about it, that the land upon which the counter-claiming Defendants seek to compel the Plaintiffs to enter is not in the occupation of either the Plaintiffs or those Defendants, but it is in the occupation of those Defendants' tenants. But, independently of that, it seems to me that the remedy is in the Defendants' own hands. The property is theirs. They can do as they like with it, and, if there is an encroachment by reason of which they are suffering any harm, they have the remedy in their own hands. I do not see, therefore, why I should order the Plaintiffs to remove these foundations, which the Defendants can deal with as they please. It is clear that there is a trespass, and I think the Defendants are entitled to some damages in respect of it. I do not see that any material damage has been proved beyond this, that an encroachment has been deliberately and wilfully made by way of trespass, which the Plaintiffs had no right to make. I think the Defendants are right in regarding this as a serious interference with their rights, and, in my opinion, they are entitled by way of damages to the cost of removing the encroachment. I intend to give them by way of damages the sum of £15, which, I think, will cover the cost of removal.

It was said on behalf of the Plaintiffs that the counter-claiming Defendants are not entitled to sue in respect of the trespass, because they are only reversioners, they having let the house to the other Defendants. In my opinion, that is not the law. In some cases, no doubt, a reversioner cannot sue for a trespass; but in many he can. I will refer first to the well-known case of *Baxter* v. *Taylor* (1). There a trespass had been committed by entering upon land in the occupation of a tenant, and it was held that in respect of such a trespass the reversioner could not maintain any action, even though the entry was made in exercise of an alleged right of way. But Mr. Justice *Taunton* (2) said

(1) 4 B. & Ad. 72. (2) 4 B. & Ad. 74.

that: "The action is by a reversioner against a mere stranger and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action brought for an injury to the reversion against a stranger. *Jackson* v. *Pesked* (1) shews, that, if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved." And Mr. Justice *Parke* said (2): "I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious." In the present case there was a taking of part of the land, carrying away of the existing materials, and putting in the foundations of a building which was clearly intended to be permanent, and by which, at any rate if they are left there long enough, a right to support would be gained.

There are several other cases to the same effect. In *Simpson* v. *Savage* (3) an action was brought by a reversioner for an injury to his reversion by the erection of workshops and a forge and chimney on land adjoining his houses in the occupation of his tenants, and a nuisance arising from the smoke issuing from the chimney. The plaintiff failed because he did not prove an injury to the reversion; the lighting of the fire in the forge, which was the only act chargeable to the defendant, not being in its nature permanent. Mr. Justice *Cresswell*, who delivered the judgment of the Court, said (4): "After considering the authorities, we are of opinion, that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest

(1) 1 M. & S. 234.
(2) 4 B. & Ad. 76.
(3) 1 C. B. (N.S.) 347.
(4) Ibid. 361.

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instances of such an action are, cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it to flow over the plaintiff's land. In the two former cases, the thing done was not removable or remediable during the term: in the third, it was; but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance. The decision in *Jesser* v. *Gifford* (1), falls within the same principle. A window was obstructed; the obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. *Tucker* v. *Newman* (2) belongs to the same class."

Then in *Metropolitan Association* v. *Petch* (3), the action was by a reversioner for an obstruction to his ancient lights, by putting up a hoarding. Chief Justice *Cockburn* said (4): "It has been contended on the part of the defendant, that this declaration is bad, on the ground that it shews only a temporary and not a permanent injury to the reversion. If it had appeared upon this declaration, as it did in many of the cases to which our attention has been directed, that the injury complained of was necessarily temporary, and could not be otherwise, I should have agreed with Mr. *Wilkinson*; it being clear, that, to entitle a reversioner to maintain an action of this sort, there must be an injury of a substantial and permanent character." Then Mr. Justice *Vaughan Williams* said (5): "The simple question, therefore, which we have to decide, is, whether upon this declaration we can see that it is impossible that the hoarding can be otherwise than a temporary structure, and so not injurious to the reversion . . . There are abundant authorities to shew, that, though the thing complained of may not be of a permanent character, in the sense of lasting many years, yet it may be so set up as to be permanent in the sense of its enuring as an injury to the reversion." Then he referred to several cases, including *Jesser* v. *Gifford*, and added: "The obstruction here complained of *may* be an injury to the plaintiff's reversionary interest, and therefore we cannot consistently with the authorities hold the declaration to be

(1) 4 Burr. 2141.
(2) 11 A. & E. 40.
(3) 5 C. B. (N.S.) 504.
(4) Ibid. 509.
(5) 5 C. B. (N.S.) 510.

insufficient." Then Mr. Justice *Willes* put it very shortly and very clearly thus (1): "The declaration in an action of this sort must either state something which is necessarily an injury to the reversion, as, the cutting down timber trees, or the like; or, if it state something else which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. Where that which is stated *cannot* be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff. Where it *must* be an injury to the reversion, that concluding allegation is unnecessary. Here, the thing complained of *may* be injurious to the reversion, as, by affording evidence in denial of the right, and therefore we cannot say that the declaration is bad."

I will refer to one other case, *Bell* v. *Midland Railway Company* (2). In that case the tenants of a landowner, who had the right to construct a siding communicating with the Midland Company's line, were obstructed by the railway company's placing across the junction carriages and some wooden balks, and it was held that the reversioners could maintain an action against the company. In the course of his judgment Mr. Justice *Willes* said (3): "There is this further answer, viz., that it is not necessary that there should be a permanent obstruction of the right of way, in order to give the reversioner a right of action: it is enough if the act is calculated to abridge or interfere with the estate of the reversioner. In *Kidgill* v. *Moor* (4), locking a gate across a way, was held to be a sufficient obstruction to give the reversioner a right of action. It is enough if for all substantial purposes the obstruction is of a permanent character. Here, there was abundant evidence for the jury that the obstruction was permanent."

These being the principles of law which have to be applied here, I have found no difficulty in coming to the conclusion of fact that there was a trespass in putting upon the Defendants' land something which was intended to be permanent. As regards the relief which is sought, I have already said that I

(1) 5 C. B. (N.S.) 513.
(2) 10 C. B. (N.S.) 287.
(3) 10 C. B. (N.S.) 306.
(4) 9 C. B. 364.

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shall not grant an injunction, but shall give damages. I see no reason for making the declaration asked, that the Plaintiffs are not entitled to lateral support for their new building from the adjacent soil of the Defendants. The Plaintiffs do not claim, and never have claimed, any such right, and it is obvious that they cannot have acquired such a right at present. What they may have acquired twenty years hence is another matter.

With regard to costs, the Plaintiffs have been in the wrong throughout, and they must pay the costs of the action, including those of the counter-claim.

Solicitors: *Poole & Robinson; Bowling, Foyer, & Hordern; Arber & Lewis.*

W. L. O.

## BELFIELD *v.* BOURNE.

STIRLING, J.

1893

*Nov.* 23, 28.

[1893 B. 3527.]

*Partnership—Action for Dissolution—Motion to Stay Proceedings—Arbitration—Return of Premium paid by a Partner—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *s.* 40.

The arbitration clause in partnership articles provided for the reference to arbitration of any difference between the partners as to the construction of any of the articles, "or as to any division, act or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the said partnership or the affairs thereof," but made no express provision for the reference to arbitration of any question as to the return of the premium paid as the consideration for the partnership.

In a dissolution action by one of the partners against the other, the Plaintiff claimed (*inter alia*) a return of the premium he had paid to the Defendant; and the Defendant moved to stay all proceedings in the action and to refer the matters in dispute to arbitration:—

*Held*, that the arbitrators would have power, under a reference, to award a dissolution of the partnership, and therefore the proper terms of such dissolution, including if necessary the return of the premium; and consequently that the proceedings in the action ought to be stayed.

*Tattersall* v. *Groote* (1) explained and distinguished.

# MOTION.

This was an action by one of two partners in a business against the other of them for the dissolution of the partnership, in which the Plaintiff claimed, "*inter alia*, a return of all moneys paid by the Plaintiff by way of premium in respect of the said business, or so much of such moneys as the Court may think just," and a receiver.

By the articles of partnership, which were dated the 29th of September, 1881, and were made between the Defendant of the first part, *J. B. E. Bourne* of the second part, and the Plaintiff of the third part, it was agreed that the parties should enter into partnership for the term of twenty-one years, and that the Defendant should pay to the Plaintiff a premium of £1500.

Article 27 was as follows:—

"If during the continuance of the said partnership or at any

(1) 2 Bos. & P. 131.

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time afterwards any difference shall arise between the said partners, or any of them, or between one or two of them and the executors or administrators of the others, or other of them, or between their or any of their respective executors and administrators, in regard to the construction of any of the articles herein contained, or to any division, act or thing to be made or done in pursuance hereof, or to any other matter or thing relating to the said partnership or the affairs thereof, such difference shall be forthwith referred to two or more arbitrators (as the case may be), one to be appointed by each party in difference, or to an umpire to be chosen by the arbitrators before entering on the consideration of the matters referred to them; and every such reference shall be deemed an arbitration within the *Common Law Procedure Act*, 1854, and be subject to the provisions as to arbitration contained in the said Act."

The Plaintiff duly paid the premium.

*J. B. E. Bourne* retired from the business in 1886. Afterwards differences arose between the Plaintiff and the Defendant, which resulted in the commencement of this action.

Previously to the action no proposal for arbitration was made on either side; but the Defendant in an affidavit swore that, at the time when the action was commenced, he was, and that he still remained, ready and willing to do all things necessary to the proper conduct of the arbitration.

The Defendant now moved, under the *Arbitration Act*, 1889, s. 4, "That all proceedings in the action might be stayed, the matters in difference therein between the parties thereto having been agreed to be referred to arbitration, and that such matters may be referred to arbitration accordingly."

*Warmington*, Q.C., and *Gregory*, for the Defendant, in support of the motion:—

The action is unnecessary and ought to be stayed. The arbitration clause contained in these articles of partnership is substantially the same as the clauses in question in *Russell* v. *Russell* (1), and *Walmsley* v. *White* (2), and the arbitrators acting

(1) 14 Ch. D. 471. (2) 40 W. R. 675.

under it would consequently have the power themselves of awarding a dissolution, and therefore of awarding all the proper terms of a dissolution, including, if necessary, the return of the premium paid by one of the partners, or a proper part of it. The *Partnership Act*, 1890, has done nothing to affect these decisions; it states in sect. 40, what was already the law, that the Court has power to order the return of the premium; but it nowhere enacts that arbitrators cannot do this. In fact, sects. 34, 39, 45, and 46 shew that they can.

*Renshaw*, Q.C., and *Cann*, for the Plaintiff:—

Although the clause is a wide one, it does not in terms empower the arbitrators to award the return of the premium, or any part of it; and the discretionary power to stay proceedings in the action, which is no doubt possessed by the Court, will not be exercised where under the reference it is sought to do something beyond the powers of the arbitrators: *Joplin* v. *Postlethwaite* (1).

It was held by Lord *Eldon* in *Tattersall* v. *Groote* (2), which is the only direct authority upon the point, that, under a reference similar to that in the present case, the arbitrators had no power to award a return of premium.

Moreover, the motion must be dismissed, as the Defendant was not at the commencement of the action ready and willing to proceed with the arbitration within sect. 4 of the Act of 1889. The proper course is that all the differences between the parties should be settled in the action: *Turnock* v. *Sartoris* (3).

*Gregory*, in reply.

1893. Nov. 28. STIRLING, J.:—

This motion is resisted first of all on the ground that, notwithstanding the wide terms of the clause, the arbitrators have no power to deal with all the questions raised in the action. Now it was admitted that the clause cannot be distinguished in substance from that which formed the subject of decision in *Russell* v. *Russell* (4) and *Walmsley* v. *White* (5). It was

(1) 61 L. T. (N.S.) 629.
(2) 2 Bos. & P. 131.
(3) 43 Ch. D. 150.
(4) 14 Ch. D. 471.
(5) 40 W. R. 675.

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consequently admitted that under it the arbitrators could consider the question of a dissolution, and award that a dissolution should take place, if they thought fit. As regards the claim for the appointment of a receiver, it is in my opinion settled that that would not prevent the staying of the action if the Court thought fit so to order on other grounds. But it is contended that the arbitrators have no power under the clause to award a return of the premium or any part of it. On principle, it seems to me that if the arbitrators have power to award a dissolution they must also have power to award the terms on which the dissolution is to take place, and that these terms are, no less than the dissolution itself, "matters or things relating to the said partnership or the affairs thereof." And if they have power to take into consideration the terms of the dissolution, they must also have power to consider whether the return of the whole or part of the premium should form one of those terms. When the Court is asked to consider the question of a dissolution, it is settled by decisions of the Court of Appeal that not only may it take into consideration the whole of the circumstances, but that it is bound to do so, and to decide whether the whole of the premium or part of it should be returned or not. That rule is recognised in *Atwood* v. *Maude* (1), and the principle is stated concisely in *Lyon* v. *Tweddell* (2). In the latter case Vice-Chancellor *Bacon* gave judgment that the partnership should be dissolved, and that the plaintiffs should be relieved from making further payments to the defendant in respect of premium; and objection was taken to his judgment as inequitable in depriving the defendant of these future payments. The Master of the Rolls (Sir *George Jessel*) said (3): "With respect to the second point, namely, the direction which the Vice-Chancellor has given as to the premiums, it is the duty of the Court when dissolving a partnership on equitable grounds to decide upon what fair terms the dissolution should be made. This has been treated in the argument as a simple question of return of part of the premiums. But that is only one element in the question. It is the duty of the Court to look

(1) Law Rep. 3 Ch. 369. (2) 17 Ch. D. 529.
(3) 17 Ch. D. 531.

at all the facts, and do what is equitable between the parties." And Lord Justice *James* said: "I think that the terms of dissolution are a matter of judicial discretion for the Judge who hears the cause, and I do not feel disposed to interfere with the Vice-Chancellor's conclusion."

Now, if it is the duty of the Court in decreeing a dissolution to take into consideration all that is equitable between the parties, and to consider the question of returning a premium, I cannot see why it is not equally within the powers of an arbitrator so to do. It was said that *Tattersall* v. *Groote* (1) precluded me from giving any such decision. That was a case at common law; the declaration stated that, in consideration of £420 paid to *Groote* by *Tattersall*, they had become partners; and it set out a partnership deed, and, in particular, a covenant in very wide terms for referring questions arising out of the partnership to arbitration. The declaration then averred that the partnership was dissolved by consent, and that, after such dissolution, *Tattersall*, conceiving himself entitled to a return of £420, the consideration of the co-partnership, all disputes touching the same were referred to the award of two indifferent persons elected for the purpose by *Tattersall* and *Groote*, but that *Tattersall* died before any award was made; that, since his death, the defendant *Margaret Tattersall*, conceiving herself to be entitled to the said £420 as administratrix, in order to put an end to the dispute, did proceed to name an indifferent person as an arbitrator on her part, and requested *Groote* to name one on his part. The breach was that *Groote* refused to nominate an arbitrator, whereby the plaintiff was prevented from recovering by means of the said arbitration the said £420 paid as the consideration of the said co-partnership, which was dissolved without any benefit accruing thereby either to *Tattersall* in his lifetime or the plaintiff as his administratrix since his death. Several points were raised, and one of them was whether a return of premium fell within the arbitration clause. And Lord *Eldon*, C.J., said: "On that point I am clearly of opinion that the case is not within the articles. See how it stands. In consideration of £420 to be paid by Mr. *Tattersall*, the parties agree to enter into the

(1) 2 Bos. & P. 131, 135.

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articles. The covenant to refer matters to arbitration in point of consideration, is sustained by the payment of £420, and yet by virtue of that very covenant it is now made a matter of dispute whether the £420 ought to have been paid or not. Courts of Equity will interfere where fraud has been practised, and order the consideration to be returned; but then they treat the articles as a nullity in consequence of the fraud; whereas here the parties apply to a Court of Law to enforce a covenant in the articles, because they are binding. Large as the words are, I do not think that they authorize a demand of an arbitration on the point, whether the consideration of the articles should have been paid or not."

If that were to be regarded as a complete statement of the law applicable to all cases dealing with return of premium, it certainly would not be consistent with the later decisions of the Court of Appeal in *Atwood* v. *Maude* (1) and *Lyon* v. *Tweddell* (2), to which I have referred, for these cases shew that Courts of Equity, do interfere where there is no fraud and a simple dissolution of the partnership is sought. But, like every other judgment, it must be read in connection with the facts of the case; and, when one looks at those facts, they are clearly distinguishable from those now before me. It is clear, first of all, that the partnership deed did not provide, in the events which had happened, for the return of or dealing with the premium; and, secondly, that the partnership had been dissolved by consent without any stipulation as to what was to be done with the premium. In *Lee* v. *Page* (3), it was held by Vice-Chancellor *Kindersley*, that under those circumstances there was no jurisdiction to award a return of premium. Vice-Chancellor *Kindersley* said: "On the 29th of August, therefore, they unconditionally signed the notice, which was inserted in the newspapers, and dissolved partnership by mutual consent. This was an unconditional dissolution by agreement, and neither party could afterwards enter into any question of what the conduct of the other had been, or insist upon his right adversely, such right having been abandoned by the unconditional dissolution. Nothing appears as to what took

(1) Law Rep. 3 Ch. 369. (2) 17 Ch. D. 529.
(3) 30 L. J. (Ch.) 857; 7 Jur. (N.S.) 768.

place. The subject of the return of the premium might have been discussed; but, on referring to the articles, it appears that no provision was made on that subject in the event of an adverse or other dissolution. Under these circumstances, the plaintiff has no right to a return of any part of the premium. In thus deciding I do not depart from the principle laid down by the Master of the Rolls in *Astle* v. *Wright* (1), where there was no agreement to dissolve; but a bill was filed insisting on the adverse right, and, under the circumstances, the premium was apportioned." So that he draws a distinction between a case where dissolution takes place without provision being made for the return of premium, and a case where the Court is asked (as it was in *Astle* v. *Wright*) to dissolve the partnership. The distinction is recognised by Lord *Cairns* in *Atwood* v. *Maude* (2).

But there is more than that. The recent *Partnership Act* of 1890, which I regard as being mainly, though not entirely, a codification of the law of partnership, recognises, on one hand, the principle of *Atwood* v. *Maude*, and, on the other hand, the decision in *Lee* v. *Page* (3). Sect. 40 provides that "where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued." That is in accordance with *Atwood* v. *Maude*. Then there are two exceptions, of which the second is: "unless the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium." That exception is in accordance with the decision in *Lee* v. *Page*. For these reasons it seems to me that the decision in *Tattersall* v. *Groote* (4) does not stand in the way of the conclusion at which I have arrived, viz., that the arbitrators may take all the circumstances of the case into consideration, and, if they award a dissolution, may say what portion of the premium is to be returned.

(1) 23 Beav. 77.
(2) Law Rep. 3 Ch. 369, 373.
(3) 30 L. J. (Ch.) 857; 7 Jur. (N.S.) 768.
(4) 2 Bos. & P. 131.

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[His Lordship further held that the Defendant was at the commencement of the action "ready and willing to do all things necessary to the proper conduct of the arbitration" within sect. 4 of the *Arbitration Act*, 1889. He accordingly ordered that the proceedings should be stayed; the costs of the action and motion to be at the discretion of the arbitrators.]

Solicitors: *Frith Needham; Stanley Attenborough & Tyer.*

W. W. K.

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STIRLING, J.
1893
*Dec.* 15.
1894
*Jan.* 16

## *In re* PRINTING, TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS. *Ex parte* CAMMELL.

*Company—Director—Qualification—Implication of Agreement to take Shares—Estoppel.*

In order to fix a director with liability in respect of his qualification shares where these have been registered in his name without any application by him and without his knowledge, it must be shewn that he has acted as a director at a time when he could not properly so act without possessing the qualification.

The articles of a company provided that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; that the office of a director was to be vacated if he ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed period.

*C.* signed the memorandum of association for one share, and was appointed a first director. He attended several board meetings, but never applied for his qualification shares. At the first general allotment, however, without his knowledge, his qualification shares were allotted to him, and he was placed on the register of shareholders in respect of them. As soon as he became aware of the allotment and registration, he requested that his name might be removed, and the day after the expiration of the prescribed period he sent in his resignation, and thereafter did not act as a director. The company was not in liquidation. On the application of *C.* to have his name removed from the register:—

*Held*, that he could not be fixed with constructive notice of the fact that his name was on the register; that there was no implied agreement on his part to take the shares; that he had not so acted as to be estopped from denying that he had entered into any such agreement; and that his application must be allowed.

THIS was a motion by Mr. *Charles Cammell*, of *Ashwicke Hall, Marshfield, Chippenham*, asking that the register of members of

the *Printing, Telegraph and Construction Company of the Agence Havas, Limited,* which was not in liquidation, might be rectified by removing his name therefrom as holder of forty shares therein numbered 12051 to 12090 inclusive, on the ground that he never applied for or agreed to take or accepted the allotment to him of the said shares, and that such allotment, if made, was improper and invalid. The company was formed in March, 1893, with a memorandum and articles of association dated the 16th of March, 1893. Article 62 provided that the first directors should be appointed by a majority of the subscribers of the memorandum of association. Article 64 provided that the qualification of a director should be the holding of £200 of share capital, in respect of which all calls for the time being due should have been paid; and that this qualification should apply as well to the first directors as to all future directors, but such first directors should be allowed one month from the first general allotment of shares of the company in which to acquire their qualification. By article 70 it was provided that the office of director should be vacated (*c*) if he ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed time: (*d*) if he should send in a written resignation to the board, and the same should not be withdrawn for seven days, or be previously accepted. The Applicant signed the memorandum of association for one share, and was appointed a first director; and his name appeared on the prospectus. On the 19th of March, 1893, the first board meeting was held, which the Applicant attended. On the 29th of March the second board meeting took place, but the Applicant was not present. At this meeting resolutions were passed for the allotment of shares in accordance with certain allotment sheets which included the name of the Applicant in respect of forty £5 shares, for which, however, he had made no application, and he was put on the register of shareholders as the holder of the forty shares in question. On the 7th of April a third board meeting was held, at which the Applicant was not present. On the 14th of April the fourth board meeting was held, at which the Applicant was again present, and the minutes of the previous meeting of the

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7th of April were read. On the 29th of April the prescribed period of one month from the first general allotment of shares expired. On the 1st of May the secretary of the company wrote to the Applicant informing him that a board meeting would be held on the 5th inst., inclosing an application for shares and asking him to sign the same and forward it to the secretary together with a cheque for £10, the amount due on application. On the 5th of May the secretary wrote again informing the Applicant that a board meeting would be held on the 9th, and the letter proceeded: "I am requested by the board to ask your kind attention to the enclosure I forwarded to you at their request on the 1st inst., as the time allowed by the articles of association for the directors to qualify has expired, and the board is anxious that all should comply with the clause relating to this with as little delay as possible." On the 7th of May Mr. *Cammell* wrote to Colonel *Engledue*, the chairman of the company, as follows: "I came to *London* last Friday" (the 5th inst.) "to attend the board meeting, and on my arrival in *London* I received a telegram calling me north. I had to see Mr. *Sandys* on some business, and I informed him it was quite impossible I could remain on the board, and that when I consented to take a seat on the board I understood from him there would be very little to do, on this side, and that it was not fair on the other directors that I should remain on and take fees and not be able to attend, and he quite agreed with my views. I cannot attend the meeting on Tuesday next, and I have nothing else to do but tender you my resignation. If it is necessary for me to send a formal notice to the secretary I will do so, and I shall be obliged by your reading this at the next meeting." On the same date he wrote to the secretary formally resigning his position as director, and he returned at the same time the form of application for shares, which he said would not now require his signature. On the 11th of May he wrote to Colonel *Engledue*, in answer to a letter from him, as follows: "In looking through the articles I find I am not a director, as I have failed to qualify in the prescribed time." On the 15th of May, Colonel *Engledue*, having seen the solicitors of the company, wrote to Mr. *Cammell*: "They think that as your name was

entered on the allotment sheets, and you are liable for the qualification, that this fulfils the required condition." To this Mr. *Cammell* replied on the 17th of May: "I was not present when the allotment took place and did not sign the allotment sheets. I think No. 70 (*c*) in the articles of association is very plain on the subject." On the 26th of May Colonel *Engledue* wrote: "I signed the allotment sheets as chairman, and as you had consented to be a director, and had also taken on yourself the responsibilities of the position by attending the meetings which inaugurated the business, I naturally supposed you intended to remain on the board. I have laid your letter and my replies before the board, and they suppose that you intend to take up your qualification, although you may not care to remain a director." To this Mr. *Cammell* replied, on the 31st of May: "I have seen my solicitor on the subject and shewn him the articles of association, and he says that by the articles I am certainly not a director, but that if I qualify I should be one; so that under the circumstances I am advised not to do so." In July the Applicant first heard (as he stated) that his name had been put on the register in respect of shares allotted to him in his capacity of director, and wrote to the secretary asking that it should be removed. To this the secretary answered that the Applicant's letter should be placed before the board. In September the Applicant received notice calling on him to pay £85 in respect of the shares. On the 1st of November the Applicant gave notice of motion as above set out, and he now sought to have his name removed from the register of shareholders in respect of all the shares in his name, except the one for which he signed the memorandum of association.

*Hastings*, Q.C., and *George Lawrence*, for the motion:—

Mr. *Cammell* never made any application for shares or agreed to take them from the company. By virtue of articles 64 and 70, at the expiration of the period prescribed for taking the qualification shares, without his having acquired them, he ceased *ipso facto* to be a director. The company had no right to allot any shares to him or to put him upon the register; and he never knew of such allotment or registration, nor was he affected by

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anything which he did with notice of any such allotment or registration so as to be estopped from denying that he agreed to take the shares.

*Buckley*, Q.C., and *E. Ford*, for the company:—

It is not necessary for us to shew that Mr. *Cammell* either applied for the shares or knew of the allotment, because he is properly on the register, and has acted as director, and the Court will not assume that he so acted without qualification. No doubt so long as the prescribed period was unexpired he might have got his shares elsewhere: *Brown's Case* (1); but after the expiration of the period, he having acted as a director, it was his duty to take them from the company: *Miller's Case* (2). The company were within their rights in putting him on the register in respect of his qualification shares, and, as he did not object within the month, his name is properly upon the register. As a director he is presumed to have known what was done, and is estopped, therefore, from denying that he was a director: *Hewitt's Case; Brett's Case* (3).

In *In re Wheal Buller Consols* (4), the director was not held liable; but there the shares were not registered in his name.

[STIRLING, J.:—The question is, whether it was Mr. *Cammell's* duty to take the shares within a reasonable time, and whether he acted after a reasonable time had elapsed: *Ex parte Lord Inchiquin* (5).]

If he acted, he was under the duty of taking them within the month.

The shares were allotted to him, and he did not repudiate them; consequently his office was not vacated under article 70. The company is not in liquidation; but that does not affect the principle of the case. After the expiration of the month, he resigned, and, inasmuch as he could not resign an office which he did not hold, he must be treated as having acted as a director.

*Lawrence*, in reply:—

Upon the evidence, Mr. *Cammell* never acted as a director after

(1) Law Rep. 9 Ch. 102.
(2) 3 Ch. D. 661.
(3) 25 Ch. D. 283.
(4) 38 Ch. D. 42.
(5) [1891] 3 Ch. 28.

the date in question. As soon as the month was up, he got the letter from the secretary inviting him to take the shares, which he declined to do. The principle upon which this case turns is this. If the Court finds a person acting as a director whose duty it is not to act as such, unless he possesses the necessary qualifications, then, whether he knows or not that he has been placed upon the register in respect of the qualification, he is deemed to have applied for them, and is estopped from denying that he has agreed to take them: *Brown's Case* (1); *Brett's Case*, and *Hewitt's Case* (2).

In *Ex parte Lord Inchiquin* (3) no doubt Lord *Inchiquin* ought not to have acted without having acquired his shares; but in this case the articles expressly provide that the director need not take the shares for a month.

Mr. *Cammell* cannot be deemed to have applied for shares after the period even if he had acted as director, which we say he did not.

The articles in *In re Wheal Buller Consols* (4) were very similar to these, and there Lord Justice *Bowen* held that though it was the director's duty not to act after the period limited for acquiring the qualification, that was very different from a provision that if he continued to act he should be deemed to have contracted to take the shares. Mr. *Cammell* has never acted at any time at which it was his duty to have a qualification, and it was never incumbent upon him to take the shares. The reasoning in *Ex parte Lord Inchiquin* does not, therefore, apply. But *Hallmark's Case* (5) is in point. The effect of the articles is that if the director does not take the shares within one month, then he automatically ceases to be a director; and if after that period has elapsed he does not act as a director, then there is no obligation upon him to take the shares.

1894. Jan. 16. STIRLING, J. (after stating the facts, continued):—

I think that upon the evidence it must be taken that until the 15th of May the Applicant was unaware that any shares had

(1) Law Rep. 9 Ch. 102.
(2) 25 Ch. D. 283.
(3) [1891] 3 Ch. 28.
(4) 38 Ch. D. 42.
(5) 9 Ch. D. 329.

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been allotted to him. The first question to be considered is whether the Applicant has agreed with the company to take the thirty-nine shares in question from it. Express agreement there is none. Can any be implied? The Applicant no doubt acted as director; but the case of *In re Wheal Buller Consols* (1) appears to me to shew that that circumstance alone is no sufficient ground for holding that he has contracted to take shares. I apply (with the necessary modifications) to this case the language of Lord Justice *Bowen* (2). The Applicant "bound himself to conform to the regulations contained in the articles, including, of course, those as to the qualification of directors. There is no provision in the articles that the directors shall take the shares required for qualification, or be liable as if they had taken them. There is only a provision that if a director does not acquire the requisite number of shares within a limited time he shall cease to be a director. That regulation makes it his duty not to act after the prescribed time; but that is quite different from a regulation that if he continues to act he shall be deemed to have contracted to take them." In the present case there is found an ingredient which did not occur in *In re Wheal Buller Consols*, viz., that the name of the Applicant had been entered on the register as the holder of the shares allotted to him on the 29th of March. If the Applicant had been aware of this, I should readily infer an assent on his part to take the shares; but I think he did not actually know it until the middle of May, and I also think that he cannot be fixed with constructive notice of the fact: see *Hallmark's Case* (3). This, however, does not conclude the case. Although the Applicant may not actually have agreed to take the shares from the company, either expressly or by implication, he may have so acted as to preclude himself from denying that he has entered into such an agreement, and the main contention on the part of the company has been that he did in fact so act. On this subject a leading authority is *Brown's Case* (4). In that case the articles provided simply that the qualification of a director should be the holding of fifty shares, and the observations which I am about to

(1) 38 Ch. D. 42.
(2) Ibid. 50.
(3) 9 Ch. D. 329.
(4) Law Rep. 9 Ch. 102.

read must be taken in conjunction with that fact. Lord *Selborne*, L.C., says (1): "The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact, that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it." And again, he says (2): "The true result to be drawn from those authorities appears to be, that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification." The Lord Chancellor, therefore, speaks of "accepting the office of director, which a man ought not to fill without qualification," or again, "for which the possession of a certain number of shares is a necessary qualification"—language which appears to indicate that in his view the obligation which lay on a director to possess qualification shares was a material element in arriving at the decision. Again, in *Ex parte Lord Inchiquin* (3), the articles of association (according to the construction put on them by the Court of Appeal) rendered it obligatory on a director to acquire the proper qualification within a reasonable time. Lord *Inchiquin* was appointed a director, and immediately afterwards shares were allotted to him,

(1) Law Rep. 9 Ch. 106. (2) Law Rep. 9 Ch. 107.
(3) [1891] 3 Ch. 28.

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but (as was assumed in the Court of Appeal) without his knowledge. After the expiration of a period within which the Court held that he might reasonably have acquired his qualification, he acted as a director, and it was held that he was estopped from denying that he was the holder of the shares allotted to him and registered in his name. Lord Justice *Lindley* (1) says: "Suppose he is not bound to qualify before he acts, still, if a reasonable time for qualification has elapsed before he acts, must he not, when he does act, be taken to have acted in respect of some qualification?" These cases appear to shew it to be essential to the application of the law there laid down that the director should be found acting as such at a time when he could not properly so act without possessing the qualification. In the present case, as I have already pointed out, the articles of association (construed by the light of *In re Wheal Buller Consols* (2)) do not impose an absolute obligation on the part of a person accepting the office of first director to acquire qualification shares before acting; they only provide that if a first director does not acquire the requisite number of shares within a prescribed time he shall cease to be a director. The prescribed time expired on the 29th of April, 1893; at that date, according to article 70, his office was vacated. Did he act afterwards? He appears to have been ignorant of the terms of the articles of association; he supposed that he continued to be a director, and for a short time was willing and intended to act. Mere intention, however, will not estop him, and he soon came to the conclusion that he ought not to remain a member of the board. After the 29th of April he attended no board meeting and did no act as director, unless, as is contended, his resignation of office be such. A man cannot, of course, resign an office which he does not hold; but in judging of the effect of this resignation, for the purpose now under consideration, regard must be had to the surrounding circumstances. The board did not treat him as having acquired his qualification; and the secretary, by the instruction of the board, requested him to sign and send in a formal application for the proper number of shares. That he declined to do; and if he had known his true position his answer would have been to the effect that his office

(1) [1891] 3 Ch. 35. (2) 38 Ch. D. 42.

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was vacated and that it was unnecessary for him to take any shares. Instead of that, he sends in his resignation, with the object of avoiding compliance with the request of the board founded on the absence of qualification. In so acting, I think that he cannot (to use the language of Lord Justice *Lindley*) be taken to have acted in respect of a qualification, or be held to have estopped himself from denying that he agreed to take the shares in question. In my opinion, therefore, the name of the Applicant was entered on the register without sufficient cause, and he does not appear to be precluded by anything which has happened from having his name removed. There must, therefore, be an order in accordance with the notice of motion.

Solicitors: *Slaughter & May; Beyfus & Beyfus.*

G. A. S.

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1893
*Nov.* 18, 21; *Dec.* 7.
1894
*March* 17.

## SAUNDERS *v.* SUN LIFE ASSURANCE COMPANY OF CANADA.

[1893 S. 2837.]

*Company—Similarity of Name—Foreign Company—Right of Foreign Company to Trade in England under its Foreign Name.*

The Defendants were incorporated in *Canada* under the name of "*The Sun Life Assurance Company of Canada,*" and, after carrying on business in *Canada* under that name for over ten years, they opened an office in *London*, and claimed the right to carry on business in this country under their corporate name.

In an action for injunction by an English company, who had carried on business in this country for more than eighty years under the name of "*The Sun Life Assurance Society*":—

*Held*, (1.) that, in the absence of fraud or dishonesty, the user by the Defendants of their own corporate name without abbreviation, addition, or other modification, involved no misstatement of fact, and could not, consistently with *Turton* v. *Turton* (1), be restrained by injunction; but *held*, (2.) that the right of the Defendants did not extend to the use of the name of "*The Sun*" or "*The Sun Life,*" without the addition of the words "*of Canada.*"

*Hendriks* v. *Montagu* (2) and *Turton* v. *Turton* discussed.

THE Plaintiff in this action was the actuary and registered public officer of the *Sun Life Assurance Society*, and by the writ

(1) 42 Ch. D. 128. (2) 17 Ch. D. 638.

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in the action he claimed "An injunction to restrain the Defendant company from carrying on in the *United Kingdom* the business of a life assurance company under the name of '*The Sun Life Assurance Company of Canada*,' or under any other name of which the word '*Sun*' forms a distinctive or conspicuous part, without clearly distinguishing the same from the name of the *Sun Life Assurance Society*; and from carrying on in the *United Kingdom* such business as aforesaid under such insignia or otherwise in such a manner as to be calculated to represent or lead to the belief that the Defendant company is the *Sun Life Assurance Society*, or that the business carried on by the Defendant company is the business of the said society."

The *Sun Life Assurance Society*, on whose behalf the Plaintiff sued, was originally established in the year 1810 by the *Sun Fire Office*, an institution whose foundation dates back to 1710. The object of the society was to effect assurances on lives, and other assurances connected therewith. Its affairs were at first regulated by a deed of settlement dated the 15th of June, 1810, but are now governed by a private Act of Parliament, passed in 1889, with the title of "*The Sun Life Assurance Act*, 1889." It had ever since 1810 carried on business in *London*, and had many branches in the *United Kingdom*, and elsewhere in *Europe*, but not in *America*. Prior to 1891, the society carried on business in *India*; but in that year a company was formed with the name of "*The Sun Life Assurance Company of India, Limited*," for the purpose of taking over such Indian business. This company carried on Indian business only, and its affairs appeared to be managed by persons connected with the original *Sun Life Assurance Society*.

The Defendant company was originally incorporated by an Act of the Canadian Legislature (passed on the 18th of March, 1865) under the name of "*The Sun Insurance Company of Montreal*." By another Act of the same Legislature (passed on the 12th of May, 1870) the name of the company was changed to "*The Sun Mutual Life Insurance Company of Montreal*." By a third Act of the same Legislature (passed on the 17th of May, 1882) the name of the company was changed to "*The Sun Life Assurance Company of Canada*," which name it now bore. It

appeared to have carried on business in *Canada* with great success ever since 1871, and to be a substantial company of good reputation, and possessed of very considerable assets. In the course of the present year 1893, it opened an office in the City of *London*, and began to carry on business there.

The Plaintiff moved for an injunction.

*Hastings*, Q.C., *Moulton*, Q.C., and *Sebastian*, for the Plaintiff, in support of the motion:—

The inevitable result of what the Defendants are doing will be that their company will be mistaken for the Plaintiff's society. If the Defendants were coming here and asking for registration of their company under the name they now propose to use, the case of *Hendriks* v. *Montagu* (1) is a conclusive authority that such registration would not be allowed.

It is well established that in such a case as this it is not necessary for the Plaintiff to prove fraud. It is enough to shew that confusion is likely to arise, and here that is abundantly proved.

The question in *Turton* v. *Turton* (2) was as to the rights of English residents; but the question here is whether Colonials can do what English residents could not do.

[STIRLING, J.:—The question here is, whether a colonial company incorporated under a name given to it by the Legislature of *Canada*, and having *bonâ fide* carried on business in *Canada* for ten years, is not entitled to trade in the *United Kingdom* under the name which it has thus lawfully acquired and used.]

That name was given to the company for the purpose of carrying on business in *Canada*, and nowhere else. There is no doubt that a man cannot be prevented from carrying on business in his own name merely because it happens to be also the name of a better-known manufacturer: *Turton* v. *Turton* (3). But this is not that case. This is an entirely new and different case. This is the case of a fancy name arbitrarily selected and used for eighty-three years by an old corporation. There is a strong

(1) 17 Ch. D. 638. (2) 42 Ch. D. 128.
(3) 42 Ch. D. 143.

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analogy between the present case and cases of the foreign user of a trade-mark, which, it is well settled, does not give the right to registration in this country. The evidence in this case shews that if the Defendant company are allowed to carry on their business as they are doing, or proposing to do, in this country, they will inevitably be referred to as "*The Sun*," or "*The Sun Life*," the words "*of Canada*" being naturally dropped for the sake of brevity. This has already happened, for in the books, papers, and documents published by the Defendant company they not infrequently refer to themselves as "*The Sun*" or "*The Sun Life*" without adding the words "*of Canada*." And though the Defendant company themselves may not have any dishonest intention, it does not follow that all their agents will be equally pure. Besides, if the Defendants, after having had their attention called to the confusion and detriment which is likely to ensue, persevere in using in *England* the name of an old-established society, they will be guilty of fraud, however innocent their intentions were to begin with. At any rate, the Plaintiff society is entitled to restrain the Defendant company from designating themselves in such manner as will lead to the belief that their company is ours.

*Finlay, Q.C., Buckley, Q.C.*, and *C. B. McLaren*, for the Defendant company:—

This is not the case of a company initiated abroad as a preliminary for coming to the *United Kingdom* and carrying on business there, but that of a colonial company, lawfully incorporated by a particular fancy name, which has for ten years carried on *bonâ fide* a large and increasing business in *Canada* and has acquired a great reputation there. This company, finding that, by reason of its colonial origin and sphere of business, the difference between English and colonial rates of interest, and other circumstances, it is in a position to offer exceptional advantages to English insurers, comes to *England* insisting on the special advantage incident to its colonial position, and opens an office here in its own name. Surely such a company is entitled to trade here under the name which has been given to it by the Legislature of *Canada*—under which, indeed, it is now

being sued. Then, as to the similarity of name, its importance is greatly exaggerated. The case of an insurance company is not like that of a merchant or shopkeeper, where there is no opportunity for an intending purchaser to correct an initial mistake. Similarity of name between two insurance companies like these is a comparatively small matter. The form of our policies shews clearly that we are a Canadian company, and, long before completion, the necessary documents would disclose our colonial name and character, even if these had not been the attraction on the part of the insurer. Thus the danger of mistake in the case of intending policy-holders is reduced to a nullity. This is a case in which it is impossible to attribute to the Defendant company any dishonest design or intention to pass off their policies for those of the English *Sun* office, and there is, in fact, no more likelihood of confusion in this case than in that of the *Sun Life Assurance Company of India.* As a matter of principle, the name of a corporation is just as much its own name as that of an individual is his; and, according to the decision in *Turton* v. *Turton* (1), by which this case is governed, the Defendant company is entitled honestly to use its own name, even though some confusion might result from its so doing, and even though (which is not likely in this case) some persons might be occasionally misled by the similarity.

*Hastings*, in reply:—

The result of sanctioning proceedings like those of the Defendants would be that a foreigner might start abroad under a name the use of which would be stopped in this country, and then, having lawfully acquired the name abroad, might come over here and use it with impunity; and thus a door would be opened which might be used for fraudulent purposes.

[He also referred to *Rousillon* v. *Rousillon* (2).]

1893. Dec. 7. STIRLING, J. (after stating the facts of the case, continued):—

The first part of the Plaintiff's motion raises the question whether the Defendant company is entitled to carry on the

(1) 42 Ch. D. 128. (2) 14 Ch. D. 351.

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business of a life assurance company under the name of the *Sun Life Assurance Company of Canada.* It was not alleged that the Defendant company had acquired the name of the *Sun Life Assurance Company of Canada* by any fraud or malpractice, or that the directors or agents of the Defendant company had any fraudulent or dishonest intentions. It was said, and there is a considerable body of evidence which goes to shew that, regard being had to the similarity of the names of the two companies, it is probable, or morally certain, that in the ordinary course of business one will be confounded with the other to the great detriment of the old-established English company represented by the Plaintiff; and it is further said that when the attention of the Defendant company is called to this result that company ought to be treated in this Court as guilty of fraud if it perseveres in making use of the name in this country, and ought to be restrained accordingly, however innocent the intentions of its advisers may have been in the first instance. Such a view prevailed in the case of *Hendriks* v. *Montagu* (1), where the Court of Appeal, at the instance of the *Universal Life Assurance Society,* restrained the English promoters of a projected new company from registering that company under the name of the *Universe Life Assurance Association,* and from carrying on business under that name; and this decision was much relied on by the Plaintiff's counsel.

On behalf of the Defendant company all dishonest intention was entirely repudiated as well in the correspondence and affidavits as at the Bar; and it is said that the *Sun Life Assurance Company of Canada* is the corporate name of the Defendant company duly conferred by the same legislative authority which called the corporation itself into being; and that in the absence of fraud or dishonesty the Defendant company is entitled to use this name even although it may be possible or even probable that the public may be occasionally misled by the similarity of names. In support of this contention the case of *Turton* v. *Turton* (2) was relied on. It was there held that the plaintiffs, who carried on business under the style of *Thomas Turton & Sons,* were not entitled to restrain the defendants, a partnership firm

(1) 17 Ch. D. 638. (2) 42 Ch. D. 128.

consisting of *John Turton* and his two sons, from carrying on a business of a similar nature under the style of *John Turton & Sons*.

Neither case exactly covers the present. Each case is an application of the law laid down in *Burgess* v. *Burgess* (1), in which Lord Justice *Turner* said (2): "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

The case of *Hendriks* v. *Montagu* (3) fell within the first of the two classes with which Lord Justice *Turner's* judgment deals, viz., that where persons not having a particular name chose to use it for business purposes. That this was so appears from the explanations given by Lord *Esher*, M.R., and Lords Justices *Cotton* and *Fry* in *Turton* v. *Turton* (4), which is an example of the second class. In that case Lord *Esher*, M.R., says (5): "Upon principle I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on—that statement being the simple truth—and he does nothing more with regard to the respective names, he is doing no wrong. He is doing what he has an absolute right by the law of *England* to do, and you cannot restrain a man from doing that which he has an absolute right by the law of *England* to do." Lord Justice *Cotton* says (6): "It is a mere statement in ordinary language—an honest statement of the persons who carry on the business, and it must be dealt with in the same way, as if

(1) 3 D. M. & G. 896.
(2) Ibid. 904.
(3) 17 Ch. D. 638.
(4) 42 Ch. D. 128.
(5) Ibid. 136.
(6) Ibid. 143.

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it was not the name of the firm describing those members who make up the firm, but the name of an individual carrying on business in his own name. In my opinion the Court cannot stop a man from carrying on his business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer." And (1): "The mere fact that the name used by the defendants is the same as that of another person, in my opinion will not justify the Court in assuming that the defendants are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be, but in my opinion when a man fairly states the business which is carried on in his own name or in the names of his partners it is not that his goods may be passed off as the goods of some other person: it is only a representation that they are made by himself." Lord Justice *Fry* says (2): "The legal question which emerges is this: Is the putting forth of such a statement by the defendants made actionable by the fact that it will be misapprehended by some persons, and that the plaintiffs will by reason of such misapprehension suffer loss. In my opinion that question must decisively be answered in the negative. It appears to me that to answer it in any other way is to interfere with the undoubted right of Her Majesty's subjects to use their own names and to make statements of fact which they are interested in making, and which they commit no wrong in making. If we were to hold that a cause of action arose from the misapprehension of the plaintiffs' customers, we should be doing this, we should be creating a cause of action against the defendants by reason of the carelessness or stupidity of the plaintiffs' customers."

Many of the observations of their Lordships appear to me to apply to the present case. This is not the case of the creation or assumption of a fancy title by a new company. The name of "*The Sun Life Assurance Company of Canada*" was conferred on the Defendant company by the legislative authority to which it owes its existence as a corporation, and has been for eleven years,

(1) 42 Ch. D. 146. (2) 42 Ch. D. 147.

and is, the corporate name of the Defendant company. That name the Defendant company is entitled to use in deeds and other formal instruments; by that name, according to the practice of English Courts, the Defendant company is entitled to sue; by that name it is being sued in this very action. The user of that name (provided it be without abbreviation, addition, or other modification) involves no misstatement of facts; it is the simple truth that the Defendant company is the *Sun Life Assurance Company of Canada*; and it seems to me that interference with the use of that name, for the ordinary purposes of the business which the Defendant company was incorporated to carry on, is open to the same objections as were considered by the Court of Appeal to be sufficient to prevent the granting of any injunction in *Turton* v. *Turton* (1). I am, therefore, unable to make any order on the first branch of the motion, so far as it seeks to restrain the Defendant company from using the name, "*The Sun Life Assurance Company of Canada.*"

The second branch of the Plaintiff's motion seeks to restrain the Defendant company from carrying on in the *United Kingdom* the business of a life assurance company under any name (other than that of the *Sun Life Assurance Company of Canada*) of which the word "*Sun*" forms a distinctive or conspicuous part without clearly distinguishing the same from the name of the *Sun Life Assurance Society*, and from carrying on such business under such insignia, or otherwise in such a manner as to be calculated to represent or lead to the belief that the Defendant company is the *Sun Life Assurance Society*, or that the business carried on by the Defendant company is the business of the said society.

In a letter written on the 27th of May, 1893, the Plaintiff objected to the use by the Defendant company of a device of *Phœbus* driving the chariot of the sun, which bears a likeness to a device of a like nature used by the Plaintiff company. By a letter of the 23rd of June, 1893, the Defendant company undertook to discontinue that user. In my opinion the representatives of that company were well-advised so to do, and it is much to their credit that they gave way so readily on this point, it now appearing that the Defendant company's device was used by it

(1) 42 Ch. D. 128.

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in *America* for a considerable time before the English company began to use its device in this country. No complaint is now made of the user by the Defendant company of this device.

As regards the user of the name of the "*Sun*," the position taken up by the legal advisers of the Defendant company in the letter of the 23rd of June is, in my opinion, in strict accordance with the legal rights of that company. "You may take it from us," say they, "that under no circumstances will our clients ever use their title except in connection with the words '*of Canada*,' and those words shall be used as prominently as the other words of the title." The Plaintiff complains that this promise has not been adhered to, and the evidence on this head calls for examination.

[His Lordship then examined in detail the evidence on this point, instancing several books, papers, and documents issued by the Defendant company, in which they referred to themselves as "*The Sun*" or "*The Sun Life*," an example of which was found in the instructions issued to their agents, in which, after advising them to insure their lives with the company, they said: "If the person you are canvassing asks, 'Are you insured in the *Sun*?' and you have to give a negative answer, what becomes of your arguments"? The learned Judge then continued:—]

In addition to this, it is shewn that letters and newspapers have been sent to the agents of the Plaintiff company on the addresses of which the Defendant company was described as "*The Sun Life Assurance Company*," without the addition of the words "*of Canada*"; and there are also put in evidence certain other documents made use of by the Defendant company, and evidently intended for use in *England*, in which the Defendant company is spoken of as "*The Sun Life*." The explanation given on behalf of the Defendant company is that all the documents complained of were originally prepared for circulation in *Canada*; and it is stated that in circulating them in *England* the Defendant company had no desire to disguise its true name. As regards the annual report for 1892 of the Defendant company, at the top of the cover of which the words "*The Sun Life*" appear in large letters, while the words "*of Canada*" are at the bottom and smaller, a new cover has been printed, and is used on this

document as now circulated; but the interior, in which the words "*Sun Life*" appear several times without the words "*of Canada*," remains the same.

It is not surprising that the directors of the English company should regard these matters with anxiety. While I am not persuaded that in any one of the documents relied on by the Plaintiff the term "*The Sun*" or "*The Sun Life*" is used in such a way as to be calculated to deceive, I think that the practice evidently indulged in by the agents in this country of the Defendant company, of speaking and writing of that company as "*The Sun*" or "*The Sun Life*," is dangerously lax. Such practice, if adopted by the general agents of the Defendant company scattered up and down the country, might lead to grave consequences. I have held that the Defendant company is entitled to use in this country its full corporate name; but, in my opinion, the right does not extend to the use of the name of "*The Sun*" or "*The Sun Life*" without the addition of the important words "*of Canada*"; and I think that those who are responsible for the management of the Defendant company's affairs cannot keep this too firmly before their own minds or impress it too strongly upon their subordinates. In my judgment, it is to be regretted that in a manual intended for the use of the general agents of the Defendant company in this country there is not to be found an express direction on this point, and that there should be found what amounts, or seems to amount, to a suggestion that the Defendant company may properly be spoken of in this country as "*The Sun*."

I can readily understand that such a practice may have originated, and be perfectly harmless, in *Canada*, where no other company of a similar name carries on business; but here strict regard ought to be had to the rights of others by a company desirous, like the Defendant company, of availing itself to the full of such legal rights as it may possess. If such a practice as I have mentioned were continued after the attention of the Defendant company has been called to it (as it now has), I should be led to draw inferences most unfavourable to the Defendant company; but I do not think I am compelled to do so at this stage. The Defendant company repudiates the imputation of dishonesty; the

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Plaintiff's counsel have pointedly abstained from making such a charge; and, under all the circumstances, I think it better to give the Defendant company the opportunity of supplying that which seems lacking. I therefore propose to direct the latter part of the motion to stand to the trial, unless, indeed, the parties are desirous now to put an end to the action; in which case I should be willing to consider any undertaking which the Defendant company may think fit to offer, or to express my own opinion of what that company ought to do. There will be no order on the motion so far as it seeks to restrain the Defendant company, their officers, servants, and agents, from carrying on in the *United Kingdom* the business of a life insurance company under the name of the *Sun Life Assurance Company of Canada*; the rest of the motion will stand over to the trial.

1894. March 17. The case was again mentioned, and the motion was agreed to be treated as the trial, and an undertaking was given by the Defendants in accordance with the judgment on the motion.

Solicitors: *James Robinson; Ashurst, Morris, Crisp & Co.*

W. W. K.

KEKEWICH, J.

1893 Dec. 8.

## *In re* ANN. WILSON *v.* ANN.

[1892 A. 1025.]

*Married Woman—Will—Appointment—General Power—Separate Estate—"Debts or other liabilities"—Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 3, 4; *s.* 4.

Under sect. 1, sub-sects. 3 and 4, and sect. 4 of the *Married Women's Property Act,* 1882, when read together, property appointed by a married woman by will under a general testamentary power becomes, on her death, liable for her "debts and other liabilities," even though she may have had no separate estate at the time she contracted them.

## ADJOURNED SUMMONS.

*Ralph Bradley,* by his will, dated the 31st of January, 1876, devised and bequeathed his residuary real and personal estate to trustees in trust for sale and conversion, and investment of the proceeds: and, after directing certain annuities to be paid out of the income of the investments, he directed that the capital should be divided equally among his four children, of whom *Alice Annie Bradley* was one: and he directed that the share of *Alice Annie Bradley* should be retained by his trustees upon trust to pay the income thereof to her during her life for her separate use without power of anticipation; and, after her decease, in trust for such person or persons in such proportions and subject to such conditions as she should by deed or will or, being covert, should by will appoint, and in default of such appointment, in trust for her next of kin, according to the *Statutes of Distribution.*

The testator died on the 26th of May, 1878.

In 1879 *Alice Annie Bradley* married *Frank William Ann,* and by her will, dated the 12th of May, 1886, in pursuance of all powers and authorities in anywise enabling her in that behalf, after appointing executors and trustees and bequeathing certain legacies, gave all the residue of her estate to her said trustees in trust for sale and conversion, and to invest the proceeds thereof, after paying her just debts, and to pay the income to her daughter (one of two children) for her life, and, after her

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death, for her, the daughter's children, as to sons at twenty-one, and as to daughters at twenty-one or marriage. By a codicil she directed her residuary estate to be held, in the events which happened, for both her children in equal shares.

The testatrix died in 1892.

The share of residue belonging to the testatrix and which had come to the hands of her executors amounted to about £9000. She had no separate estate at the time of contracting the liabilities mentioned below, and never had any real or personal estate other than what she was entitled to under the will of her father, *Ralph Bradley*.

Shortly after her death this administration action by originating summons was commenced by her executors against her two children, both of whom were infants; and on the 11th of August, 1892, an order was made for general administration, but directing that, for the present, an account of debts only was to be taken. In pursuance of advertisements issued for that purpose, several claims against the testatrix's estate were sent in. These claims, all of which were contracted or incurred by the testatrix during her coverture and after the year 1882, were inquired into, and the greater part of them were allowed in whole or in part, subject to the opinion of the Judge on the question hereafter stated; some of these claims being in respect of judgments obtained in the High Court or in various County Courts against the testatrix. Before making his certificate the Chief Clerk submitted a statement of facts to the Judge, raising the question whether the property bequeathed to the testatrix by the will of her father, and purporting to be appointed by her will, became her separate property, and, as such, assets liable to the payment of all or any of the before-mentioned claims. On the 26th of June, 1893, his Lordship made an order in Chambers expressing his opinion that the appointed funds were, and were to be treated as, assets of the testatrix as if they had been her separate estate when she contracted the debts in question. In accordance with that ruling, the Chief Clerk proceeded with the inquiry as to debts, and on the 8th of August, 1893, made his certificate, allowing debts, as specified in the schedule, to the amount of £800.

The Defendants, the two infant children of the testatrix, then took out the present summons to vary the Chief Clerk's certificate by disallowing the debts, and asking that it might be declared that the property bequeathed to the testatrix by her father, and purporting to be appointed by her will, did not become her separate property, and, as such, liable to the payment of the above-mentioned debts, or any of them.

The summons, having been adjourned into Court, now came on for hearing.

*Boome*, for the Plaintiffs, the executors.

*Warmington*, Q.C., and *Edward Clayton*, for the Defendants, the infants:—

The question is whether the property appointed by the testatrix under her general power is subject to her debts allowed by the Chief Clerk. We submit it is not. The question depends upon the construction to be placed on sect. 4 of the *Married Women's Property Act*, 1882, which says that, "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

In *Pike* v. *Fitzgibbon* (1) it had been held that the general engagements of a married woman could be enforced only against so much of her separate estate to which she was entitled, free from anticipation, at the time the engagements were entered into, as remained at the time the liability was sought to be enforced, and not against separate estate to which she became entitled after the time of the engagements. To meet that case, sect. 1, sub-sect. 4, of the *Married Women's Property Act*, 1882, was enacted.

Sect. 1 defines the position of a married woman with regard to her separate estate, and how far it can be made available by a person with whom she has contracted; and sub-sect. 4, while rendering liable separate property which she may acquire after the contract, makes it a condition precedent that, at the time the

(1) 17 Ch. D. 454.

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contract is entered into, she should be entitled to some separate property free from anticipation. Sub-sects. 2 and 3 also point to the necessity of her having separate property at the time of the contract, in order to render her after-acquired property liable under it: *Palliser* v. *Gurney* (1); *Scott* v. *Morley* (2).

Then, coming to sect. 4, the property appointed is only liable for her debts and other liabilities "in the same manner" as her separate estate is made liable under the Act, and her separate estate is not liable if, as in the present case, she had none at the time she incurred debts or other liabilities. The words "in the same manner" prevent her exercise of the power making the appointed property her general assets. In fact, this appointed property is not her separate estate at all, for the appointment did not take effect until her death. A power, though general, is not "property" at all: *Ex parte Gilchrist* (3); *In re Roper* (4); *In re Parkin* (5). The words "debts and other liabilities" in sect. 4 must be read in a restricted sense. Properly speaking, a contract by a married woman for payment of a sum of money, though called a debt, is only a debt *sub modo*: *In re Roper* (6); and under the Act the contract only creates such a debt or liability as can be enforced under the Act: that is to say, to make a debt enforceable against the property of a married woman, she must have had some separate estate at the time she incurred it. She cannot contract unless she has separate property. Where she has none, her "engagements" are not debts or liabilities at all, or in any way enforceable against her property.

In *In re Roper* Mr. Justice *Kay* distinctly held that the exercise by the married woman in that case did not make the appointed property liable as assets of the appointor, because her obligations under a mortgage executed by herself and her husband were not, strictly speaking, debts. It does not appear from the report of that case that sect. 4 was considered, but apparently it must have been: *Farwell* on Powers (7).

(1) 19 Q. B. D. 519.
(2) 20 Q. B. D. 120.
(3) 17 Q. B. D. 521.
(4) 39 Ch. D. 482, 487.
(5) [1892] 3 Ch. 510, 521.
(6) 39 Ch. D. 489.
(7) 2nd Ed. p. 264.

[KEKEWICH, J.:—In that case Mr. Justice *Kay* delivered a considered judgment. It was not a case under sect. 4; it was on a different point, and I do not understand its application to the present case.]

At all events, we rely on Mr. Justice *Kay's* opinion in *In re Roper* (1). It is true that in the case of *In re De Burgh Lawson* (2) Mr. Justice *Stirling* held that property appointed by will by a married woman, under a general power, was subject to her debts; but there the Chief Clerk's certificate, which was not open to review, had concluded the matter by finding that there were debts of the testatrix (3). In the present case, by the summons to vary we wish to avoid that result; and we say that the persons scheduled are not entitled to "debts or liabilities," by reason of a married woman without separate estate being unable to contract them. Mr. Justice *Stirling* did not mean to differ from Mr. Justice *Kay's* opinion in *In re Roper*.

Sect. 4 really only carries out the policy of sect. 1, sub-sect. 4: that is to say, if a married woman has separate property at the time of the contract, it extends the liability to her subsequently appointed property, as sect. 1, sub-sect. 4, extends the liability to her after-acquired property.

*Methold*, and *Chester*, for creditors, were not called upon.

KEKEWICH, J.:—

The construction attempted to be put upon sect. 4 of the *Married Women's Property Act*, 1882, is possible grammatically, and may be to some extent justified by the decisions; but it is inconsistent with the Act as a whole, and is so narrow that, in my opinion, the Court ought not to adopt it unless it is driven to do so, which in my judgment it is not. We are now dealing with a general power of appointment exercised by will only. In that case, when you refer to the execution of the power, you refer to the death of the appointor: it is at that time, and no other, that it must have the effect given to it by the statute, namely, making the property appointed liable for something.

(1) 39 Ch. D. 482. (2) 41 Ch. D. 568.
(3) 41 Ch. D. 572.

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The question is, For what? Sect. 4 says, "for her debts and other liabilities." The argument is this. A married woman has, strictly speaking, no debts or liabilities at all. This is clearly stated by Mr. Justice *Kay* in *In re Roper* (1); but that statement assumes, and I am bound to assume, that there are some engagements by a married woman which may properly be called "debts and liabilities." It would stultify the legislation to say that there can be no debts or liabilities of a married woman when the section speaks of "her debts and other liabilities." What must be meant, therefore, is that those engagements—those results of quasi-contract—which would result in creating debts or liabilities in the case of a man would result only in creating a charge on separate property in the case of a married woman, and for that her separate estate is to be liable. The argument is that, inasmuch as, according to the decision in *Palliser* v. *Gurney* (2), a married woman cannot enter into a contract binding on her separate estate unless she is, at the date of the contract, possessed of some separate estate, however small; therefore there can be no debts and no other liabilities within this section except upon the basis of separate estate existing at the time when the debts or liabilities are contracted; and that, in the absence of that separate estate existing, there are no debts or liabilities at all. The result of that would be this, that a married woman might give orders for large amounts of, say, millinery or jewellery, she having a general power of appointment over certain property but having no separate estate, and that then the appointees under her will of the property would take it, but the milliner or jeweller would not, simply because she had not a £5 note at the time she gave the orders. The Legislature may have made such a provision, but I do not find it expressed, and it would be entirely inconsistent with the scheme of the Act, which is, to put a married woman having separate property on the same level, as regards her debts and liabilities, as a man, or a *feme sole.*

In my opinion, the narrow construction suggested is precluded by the words, "in the same manner as her separate estate is made liable under this Act." What is it that the Act does with

(1) 39 Ch. D. 482, 489. (2) 19 Q. B. D. 519.

regard to a married woman's separate estate? It has provided by sect. 1, sub-sect. 3, that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn"; and by sub-sect. 4, that, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Those sub-sections should be read into this sect. 4; so that the property appointed by the married woman is to be made liable "for her debts and other liabilities"; that is to say, those engagements which would be her debts or liabilities if she had been competent to enter into them, would be payable not only out of property belonging to her at the time, but also out of property which was acquired by her after the date of those engagements. That, in my opinion, is the meaning of the statute.

But then, it is said, I have, against that, to apply the doctrine of *Palliser* v. *Gurney* (1). It appears to me, however, that the Legislature has met that by saying that the after-acquired property shall be liable. *Palliser* v. *Gurney* says that the after-acquired property of the married woman is to be under no liability unless she had some property at the time her engagements were entered into; but the Legislature has said, in sect. 4, that when the will has come into operation by the death of the donee of the power, and the power has been exercised by the will, thenceforward the property appointed becomes liable to her debts and liabilities in the same manner as if it had been her separate estate at the time she entered into the contract or engagement. Of course, those words are not in the section, but this appears to me to be the proper reading of it, and to read it otherwise would be to adopt too narrow a construction, for the reasons already mentioned.

My holding, therefore, is that these engagements which were entered into by the married woman during her coverture, and which might have been proved against her separate estate if, at the

(1) 19 Q. B. D. 519.

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time of entering into each contract in succession, she had separate estate, may now be proved against the property appointed by her will under her general power.

On this ground therefore, and irrespective of the direction in Mrs. *Ann's* will for the payment of her debts, on which, no doubt, Mr. *Methold* if called upon would have had something to say, I make no order on the summons.

Solicitors: *Dennison & Co.; E. C. Kilsby; E. & J. Mote.*

G. I. F. C.

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KEKEWICH, J.
1893
*Dec.* 14, 15.

## *In re* LAWRANCE.
## BOWKER *v.* AUSTIN.

[1893 L. 1786.]

*Solicitor—Marriage Settlement—Costs—Trustees—Lien.*

A solicitor preparing a marriage settlement on the instructions of the husband, and subsequently retaining it in his possession, has no lien upon it, as against the trustees, for his unpaid bill, but is bound to deliver it up to the trustees upon their requesting him to do so.

*Re Gregson* (1), not followed.

### ADJOURNED SUMMONS.

By the settlement, dated the 3rd of September, 1889, made on the marriage of *Edward George Lawrance* and *Lilian Edith* his wife, various trust funds belonging to the husband were settled upon the usual trusts for the husband and wife and the issue of the marriage. The settlement, a conveyance to the trustees of even date of real estate belonging to the husband, and the transfers of the settled securities, were prepared by Messrs. *Austin & Austin,* a firm of solicitors, acting on the husband's instructions.

On the 28th of March, 1892, the husband was adjudicated bankrupt, being then indebted to his solicitors, Messrs. *Austin & Austin,* in a sum of £89 4*s.* 1*d.* on a bill they had delivered to him in January, 1891, for their costs in relation to the settlement. The amount consisted to a large extent of stamp duty and other disbursements paid by them.

(1) 26 Beav. 87.

The settlement and other documents relating to the trust were kept at Messrs. *Austin & Austin's* offices, where they had been ever since the marriage, some being kept in a tin box and others in the firm's safe.

Mr. *Richard Freer Austin*, a member of the firm, was one of the three trustees of the settlement. He having intimated his intention of retiring from the trust, the question arose whether his firm could assert a lien upon the trust documents in their possession for their unpaid bill and interest. This summons was then taken out by the two trustees, other than Mr. *R. F. Austin*, against that gentleman and his partner, and also against the Official Receiver in the husband's bankruptcy, and the wife, asking that it might be determined whether the trustees ought to raise the amount of Messrs. *Austin's* bill and interest out of the trust funds; and, if necessary, whether Messrs. *Austin* had any lien on the settlement and other trust documents.

*Renshaw*, Q.C., and *A. F. Peterson*, for the Plaintiffs:—

The solicitors cannot, as against the trustees, claim any lien upon the settlement and other trust documents. These documents are the property of the trustees, not of the husband, and therefore no lien can be claimed for his debt. The only authority in favour of such a lien is *Re Gregson* (1); but that is opposed to the later decisions of *In re Snell* (2), *In re Mason and Taylor* (3), *Macfarlane* v. *Lister* (4), and *Brunton* v. *Electrical Engineering Corporation* (5), and should not now be followed.

*Warmington*, Q.C., and *G. P. Macdonell*, for the Defendants, the solicitors:—

According to *Re Gregson*, which was not cited in the two later cases and has never been overruled, we can claim a lien. The solicitors were acting for the settlor, and until all their proper charges are paid the trust estate can acquire no rights. Until their rights as against the settlor are satisfied, the rights of the trustees to the documents do not begin.

(1) 26 Beav. 87.
(2) 6 Ch. D. 105.
(3) 10 Ch. D. 729.
(4) 37 Ch. D. 88.
(5) [1892] 1 Ch. 434.

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KEKEWICH, J.:—

The absence of any reported decision upon this point since *Re Gregson* (1) was decided in 1858, shews that it is one that really is not found of much practical importance. It is strange that that case was not cited or referred to in *In re Snell* (2) or in *In re Mason and Taylor* (3), because it would certainly have been in point; for if it is a sound decision, and one which ought to be followed, it goes to this—that the lien of a solicitor, which of course arises out of his implied contract with his client, extends not only to the client, but to every person claiming under the client, whether with or without valuable consideration; and if that is the law, then *In re Mason and Taylor* and *In re Snell* ought to have been decided in a different way, unless indeed you can infer another contract from the conduct of the parties. If you can do that, then of course *Re Gregson* may be held not to apply; though I am bound to say it seems to me that the materials for inferring another contract probably existed there as well as in the other cases. I have not searched all the text-books on the law relating to solicitors, but I think it will probably be found that, though *Re Gregson* is of course cited in them, it is cited as an authority without comment, and without pushing it to the extent to which it is now desired to push it.

On the other hand, I have the two cases of *In re Snell* and *In re Mason and Taylor*, which were decided upon what seems to me a sound principle. Let us consider how a marriage settlement comes to be prepared. When I say "a marriage settlement," of course I mean any documents necessary for the completion of a marriage settlement—any muniments of title or documents of that kind, without which the marriage settlement is not complete; as, for instance, where real estate is conveyed to trustees in trust for sale and to hold the proceeds upon the trusts of an indenture of even date, the two documents comprise one marriage settlement. How does it come into existence? The gentleman instructs his solicitor to prepare the necessary documents, he communicating, of course, with the lady's solicitor, and the latter, according to the general practice of the profession, actually

(1) 26 Beav. 87. (2) 6 Ch. D. 105.
(3) 10 Ch. D. 729.

prepares them at the gentleman's cost. That is the ordinary rule. The trustees, of course, have to be communicated with, the solicitor preparing the documents having to be put into communication with them. In one sense they are not the solicitor's clients, because, in the absence of express retainer—which I never saw—they certainly would not be liable for any costs; but they are his clients in this sense, that he recognises them as the persons who are to become entitled to the property, and, becoming entitled to the property, to hold it upon the trusts of the settlement; and they must, of course, have the custody of the settlement itself. It seems to me that the conduct of the solicitor accepting that duty thus raises an entirely new contract—a contract that he will not enforce his lien; that he will prepare that document or assist in the preparation of it for the benefit of the trustees who are, in the modified sense I have mentioned, his clients. I believe it is the solicitor's bounden duty to tell his client, and to tell the trustees, if he intends to insist upon his lien, "I will undertake this duty; I will see to the preparation of this document—to the stamping, and so forth; but, remember, I shall not part with it unless I am paid my costs." I do not think that either the instructing client or the trustees can be assumed to know that any such lien exists. I think the lien is inconsistent with the position in which a solicitor stands. It is a matter of regret to everybody that solicitors should not be paid their costs when unfortunately there is a bankrupt client. It is still more a matter of regret that they should not only not be paid their reasonable remuneration, but that they should be out of pocket as regards the stamp duty and other disbursements which on a marriage settlement sometimes run heavy. But I cannot go into that; whether it is a few pounds or a very large sum, as sometimes it is, the principle must be the same, as I understand the decisions in *In re Snell* (1) and *In re Mason and Taylor* (2). Where a solicitor is acting for the gentleman and the trustees, and the marriage settlement is all being done in one office, there being no independent solicitor employed, then the solicitor has a duty to perform to two sets of persons, and he must act, and it must

(1) 6 Ch. D. 105. (2) 10 Ch. D. 729.

KEKEWICH, J.
1893
*In re* LAWRANCE.
BOWKER *v.* AUSTIN.

be assumed that he does act, in such a way as to perform his duty to both sets of persons. On behalf of the trustees, he is bound to see that a perfect deed is completed and handed over to the trustees.

Something was said about the time when the completion took place. It is not necessary for me to go into that. The question as to when the settlement becomes the property of the trustees, as distinguished from the property of any one else, I need not now consider. It does certainly become the property of the trustees when it is thoroughly completed, so that they are entitled, and in fact bound, to lock it up in the box and deny access to it by any other person.

In my opinion, therefore, if *Re Gregson* (1) interferes with that proposition, I am not bound to follow that case; but I must follow the other two cases, which were decided on a principle which is not enunciated in *Re Gregson*, and can only be picked out of it.

I have taken care, in giving judgment, to avoid resting upon the fact that one of the trustees is a member of the solicitors' firm. I am not saying that this circumstance is unimportant; but I would rather put my judgment on the broader ground, and therefore I give my judgment independently of that fact.

The result is that there is no lien, and the rest follows.

It has been suggested that the trustees of the settlement might, on the question asked for that purpose in the summons, pay these costs out of the trust fund. It is quite impossible for me to accede to that. If there were a lien, probably I might, on a proper application, assent to the trustees paying these costs in order to discharge the lien; but if they can get the deed for the benefit of their *cestuis que trust* without payment of the money, I cannot say that they ought to be generous to the solicitors with other people's money.

[His Lordship accordingly made an order declaring that the solicitors had no lien on the settlement and other trust documents, and were not entitled to have the £89 4*s.* 1*d.* paid out of the trust funds; and directing delivery up of the box containing the documents, so that the same might be deposited in *Lloyd's*

(1) 26 Beav. 87.

*Bank* in the names of the trustees. The trustees to raise and pay the costs of the application out of the trust property those of the Plaintiffs as between solicitor and client, and those of the solicitors and all other parties as between party and party.]

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*In re* LAWRANCE.
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Solicitors: *Surman & Quekett*, agents for *Bowker & Son, Winchester; Austin & Austin.*

G. I. F. C.

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## *In re* HARRISON. HARRISON *v.* HIGSON.

KEKEWICH, J.
1893
*Dec.* 16.

[1893 H. 2634.]

*Will—Construction—Illegitimate Children—Gift to "Children" of Person described as "Wife."*

A testator bequeathed his residuary estate in trust for his four children by name, including "*A. J. H.* the wife of *J. H.*," and declared that his trustees should stand possessed of the share thereinbefore given to the said *A. J. H.*, upon trust to invest the same and pay the income to the said *A. J. H.* during her life, and so that "during any coverture" she should not have power to anticipate the same, and, after her death, in trust for "the children or child of the said *A. J. H.*," who being a son or sons should attain twenty-one, or being a daughter or daughters, attain that age or marry, and if more than one, equally. *J. H.* had married a sister of the testator, who died in the testator's lifetime, and after her death had gone through the ceremony of marriage with the testator's daughter *A. J.*, and had had a child by her. The testator was aware of these facts. After the death of the testator, two other children of *J. H.* by the testator's daughter *A. J.* were born. She afterwards died:—

*Held*, on the authority of *In re Horner* (1), that the child born before the date of the will was entitled to the share.

*JOHN HARRISON*, by his will, dated the 22nd of December, 1887, gave, devised, and bequeathed his residuary real and personal estate upon trust for conversion and payment of an annuity, and subject thereto in trust for his four children, *John Harrison, Margaret E. Thomson, "Anne Jane Higson* the wife of *James Higson,"* and *Frederick W. R. Harrison*, in equal shares; and (after directing a settlement of the share of *Margaret E. Thomson*) the testator declared that his trustees should stand possessed of

(1) 37 Ch. D. 695.

KEKEWICH, J.

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the share in the trust moneys thereinbefore given to the said *Anne Jane Higson*, and should invest the same in the names or name, or under the legal control, of his trustees in or upon any of the investments thereinafter authorized, and should pay the income of the said share and the investments representing the same to the said *A. J. Higson* during her life, and so that during any coverture she should not have power to anticipate the same; and after the death of the said *A. J. Higson* should stand possessed of the said share and of the investments thereof in trust for the children or child of the said *A. J. Higson*, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares as tenants in common; provided always that if either of his said daughters should die in his lifetime leaving issue living at his death, their or her share should be held upon and for the same trusts and purposes as if she had died immediately after his death. The will contained no other reference to *James Higson*. The testator died on the 26th of April, 1888.

*James Higson*, named in the will, had married the sister of the testator; she died in November, 1879, and, in July, 1881, *James Higson* went through the ceremony of marriage with the testator's daughter *Anne Jane*, being the person referred to in the will as "*Anne Jane Higson* the wife of *James Higson*." One child of *James Higson* and *Anne Jane Higson* (or *Harrison*) was born previously to the date of the testator's will. It was proved that the testator was aware of these facts; but there was some conflict of evidence upon the question whether he was on good terms with *James Higson* and *Anne Jane Higson*.

Two other children of *James Higson* by *Anne Jane Higson* were born after the death of the testator.

*Anne Jane Higson* died on the 17th of January, 1892, and the trustees of the will, as Plaintiffs, took out a summons in the *Liverpool* District Registry against *Margaret E. Thomson* (described as *Margaret E. Higson*), *Frederick W. R. Harrison*, and the three infant children of *Anne Jane Higson*, as Defendants, asking that it might be determined who was, or were, now entitled to the share of the testator's residuary real and personal estate be-

queathed in favour of his daughter *Anne Jane Higson* and her children.

*P. O. Lawrence*, for the Plaintiffs, the trustees of the will.

*Renshaw*, Q.C., and *Rotch*, for the three children of *Anne Jane Higson* :—

It is difficult, in face of the authorities, to support the claim of the two younger children; but *In re Horner* (1) is a clear authority to shew that the eldest child, born before the date of the will, is entitled to take. *In re Horner* was founded on *Hill* v. *Crook* (2), and when the reasons for the judgment of Mr. Justice *Stirling* are considered it is impossible to distinguish this case from that. The testator, having described his daughter as "the wife of *James Higson*," has recognised *James Higson* as being in the same position as if he had married her; and, when referring to the children of his daughter, must be taken to have meant the children of that union.

*Warmington*, Q.C., and *T. R. Hughes*, for the Defendant *Frederick W. R. Harrison* :—

The terms of this will bring the case within *Dorin* v. *Dorin* (3), and the word "children" must have its proper legal meaning—*i.e.*, legitimate children. The testator directs that his daughter *Anne* should not have power to anticipate during "any coverture." This shews that he contemplated the possibility which existed of her forsaking the connection with *James Higson* and contracting a legal marriage. If she had done this, and had had legitimate children, they alone would have taken: *In re Ayles' Trusts* (4). In the case of *In re Horner*, the testator's sister, whom he described as "the wife of *T. H.*," was to his knowledge at the date of his will past child-bearing. In that case, therefore, to have applied the principle of *Dorin* v. *Dorin*, and introduced the word "legitimate" before children, would have made nonsense of the will. Mr. Justice *Stirling* in *In re Horner* did not intend, and does not purport, to decide anything other than that which was decided by the House of Lords in *Dorin* v. *Dorin*.

(1) 37 Ch. D. 695.
(2) Law Rep. 6 H. L. 265.
(3) Law Rep. 7 H. L. 568.
(4) 1 Ch. D. 282.

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[KEKEWICH, J., referred to *In re Haseldine* (1).]

Every word in this will can have effect in favour of legitimate children.

*H. Cuningham*, for the Defendant *Margaret E. Higson.*

KEKEWICH, J.:—

These cases invariably present great difficulty, because the rule, which will be found laid down in any one of the judgments of learned Judges in the cases which have been cited, is a strong one. I take it at haphazard from the case which is first under my hand—namely, from the judgment of Lord Justice *Bowen* in *In re Haseldine* (2). He says that the word "children," "*primâ facie*, applies to legitimate children only, and illegitimate children are excluded unless the language of the testator shews that he meant to include them." Having that case—to which I must refer again directly—before me, I may as well notice that the Court of Appeal allowed force to evidence of surrounding circumstances by an adoption of the rule in *Wigram* on Extrinsic Evidence, set out in the note on p. 513 of 31 Ch. D. You must bring in some facts, whether in this case or any other, where the words require explanation—that is to say, you must bring in those facts which enable you to stand in the testator's shoes, or, as it is sometimes phrased, to sit in his chair, and see the objects which the will affects. I must, on the evidence before me, take it that this testator knew that his daughter *Anne Jane Higson* was not the wife of *James Higson.* That, I think, is clear beyond dispute. She had gone through the ceremony of marriage with *James Higson*, and that, I think, the testator also knew. In the absence of evidence to the contrary, I must assume that the testator, knowing the parties well—whether he was on good terms with them or not is perfectly immaterial—must have known that the marriage of *James Higson* with this lady was not good in law. Therefore, if he chose to designate her as the wife of *James Higson*, he was applying an expression of courtesy which would not hold good in its strict meaning. One must get at that before one goes further, as is pointed out by Mr. Justice *Stirling* in *In*

(1) 31 Ch. D. 511. (2) 31 Ch. D. 517.

*re Horner* (1). Referring to *In re Ayles' Trusts* (2), he says: "In the next place it is not said positively one way or the other in the report whether the testator was aware of the fact that *James Hicks* and his daughter *Ann* had not been married at the date of the will. That of course is a most important point, because unless the Court is satisfied that the testator knew that the person whom he designates as wife was not in fact the wife, you cannot arrive at the conclusion that he was using the word 'wife' otherwise than in its legal meaning." I am perfectly satisfied here that the testator knew that *Anne Jane Higson* was not the wife in a legal sense of *James Higson*, and that therefore, when he describes her as the wife of *James Higson*, he must be taken to mean the reputed wife—the lady who is living with *James Higson* as his wife, notwithstanding that she does not strictly fill that character. Then, of course, there is nothing to prevent him making a bequest to her children by *James Higson* as *personæ designatæ*. There is nothing to prevent his doing that in any language which would satisfy the Court that he intended the issue of this connection to take. The question of construction is whether, having regard to the surrounding circumstances, he has done so.

The case is by no means free from difficulty. The testator makes a gift of this share to "*Anne Jane Higson* the wife of *James Higson*," and then, as he does with another daughter's share, he settles the share and gives his daughter a life interest, and after her death directs the trustees to stand possessed of the share in trust for her children or child. [His Lordship read the terms of the gift, and continued:—] Am I to understand that as meaning the children or child of *Anne Jane Higson* by her present or reputed husband, the gentleman with whom she is living as his wife, or am I to restrict it to its strict legal sense, as meaning the legitimate children of *Anne Jane Higson*? It is an extremely strong thing to say that the testator contemplated —I must not say a divorce, but a severance of this connection, and then a marriage between *Anne Jane Higson* and a stranger, and that his language is directed only to that. I have already pointed out that he knew that they were living together, and the

(1) 37 Ch. D. 707. (2) 1 Ch. D. 282.

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way in which he referred to that fact. But he knew more than that. He knew that there was a child of the connection. That fact is conclusively proved by the evidence; and to my mind there is an absolute repugnancy between the words and the facts, such as Mr. Justice *Stirling* found in *In re Horner* (1), where he says (2): "I find *Charlotte* described as 'the wife of *Thomas Horner*.' She was not his wife; and, therefore, if I were to hold that 'wife' meant legal wife, and 'child' meant legitimate child, I should be introducing, as it appears to me, a repugnancy and inconsistency between the language of the testator and the facts of the case." If I were to hold that this testator did not include in the "children or child of the said *Anne Jane Higson*" the child then living of *Anne Jane Higson* by *James Higson*, I should find that repugnancy; and, that being so, I am entitled to say that the testator did mean to include that child.

I have intentionally passed over an expression which has been referred to in the limitation of the life interest of *Anne Jane Higson*—it is, that the income is to be paid to her during her life; and so that, "during any coverture, she shall not have power to anticipate the same." The testator does not say during her present or any future coverture—which is, unless my memory is at fault, the more common form of conveyancers. The expression which I find here may not improbably have been used by a draftsman who bore in mind the fact that there could not in law be a limitation of that kind during the existing coverture or connection; and it may have been used in that way for what it was worth. But I am asked to conclude that the testator not only contemplated the possibility of a real future coverture, but intended it to be understood that the reputed coverture was not one in fact, and therefore that he thought only of a future marriage, and intended the expression "children or child" to refer only to the children or child of a future marriage. I think that would be forcing the words too far, having regard to the circumstances which he must be taken to have known. It seems to me that, though the case of *In re Horner* was entirely different in its facts, the principle of that decision, properly applied to the facts of this case, justifies

(1) 37 Ch. D. 695. (2) 37 Ch. D. 705, 706.

me in saying that the one child born at the date of the will is entitled to take. And that conclusion seems to me to be consistent also with *In re Haseldine* (1), in the Court of Appeal, and with *Hill* v. *Crook* (2), which, of course, is binding on both Courts. There is a difficulty which has been pressed on me by Mr. *Warmington*, that if there had been a severance of the connection with *James Higson*, and then a marriage of *Anne Jane Higson* with some other person, and issue of that marriage born, there would have been a difficulty in saying who were to take under this clause, because it would be impossible to exclude legitimate children; and the general rule of law is, that legitimate and illegitimate children cannot take as one class. The answer is to be found in the observations made by Lord Justice *Bowen* in *In re Haseldine* (3), the short effect of which is that, if once you arrive at the conclusion, upon the language of the will, construed with reference to circumstances fairly under consideration, that illegitimate children, or some illegitimate children, are intended to take, you are not to be deterred by the possibility of legitimate children also coming in, because it would be possible in such a case as that to treat the class as consisting of legitimate and illegitimate children. I have not that case to deal with here, because that state of facts has not arisen; but the possibility has to be taken into consideration, and I think that the observations of Lord Justice *Bowen* meet it.

The claim of the after-born children seems to me to be entirely excluded. The authority on that point, standing out beyond all others, is *Dorin* v. *Dorin* (4). Lord Justice *Cotton*, who was engaged as counsel in that case, spoke of it as a hard case (5), and the House of Lords were disposed to assist the claimants if they could. There the circumstances pointed very strongly towards including the illegitimate children. A man made a will providing for the children of the lady with whom he had been living for some time; but the Court said that the word "children" must mean the children of a legal marriage, where that was possible. I have not forgotten that a legal marriage

(1) 31 Ch. D. 511.
(2) Law Rep. 6 H. L. 265.
(3) 31 Ch. D. 519.
(4) Law Rep. 7 H. L. 568.
(5) See 31 Ch. D. 517.

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between these two persons was not possible; but a marriage between this lady and a stranger at some future time was possible; and I cannot admit illegitimate children who are not strictly within the description given by the testator.

Solicitors: *Donnison & Edwards, Liverpool; Peter Graham, Liverpool,* agent for *Dutton & Son, Newcastle, Staffordshire.*

C. C. M. D.

# THORNELOE *v.* HILL.

ROMER, J.

1894

*Jan.* 12, 13, 15, 16, 22.

[1892 T. 2171.]

*Business—Goodwill—Trade Name—Assignment in Gross—Infringement—Injunction.*

*John Forrest*, a watchmaker in *London*, used to mark the words "*John Forrest, London*," on the goods made by him. After his death, in 1871, his administratrix sold his business and goodwill to *C. & Co.*, watchmakers in *London*. In 1874 *C. & Co.* granted to *S. & Co.*, watchmakers in *Liverpool*, the sole right for seven years to put the words "*John Forrest, London*," on the watches they made. After the expiration of the license *C. & Co.* inscribed "*John Forrest, London*," on very few, if any, of their watches. In 1890 they assigned all their estate for the benefit of creditors, and their trustee sold their business to *X.*, who carried it on; and at the same time the trustee purported to assign to *T.*, a watchmaker at *Coventry*, "the name, title, and goodwill of *John Forrest, London*." In an action by *T.* to restrain a rival watchmaker in *Coventry* from selling watches inscribed "*John Forrest, London*":—

*Held*, that the action could not be maintained, for that, assuming *C. & Co.* acquired in 1871 the right to inscribe "*John Forrest, London*," on their watches, they lost that right under the license to *S. & Co.*, and never regained it:

*Held*, also, that even if anything was assigned to *T.* by the trustee of *C. & Co.*, it was merely the right to use the name "*John Forrest, London*," unconnected with any business, and, being a mere assignment in gross, was invalid.

FOR many years prior to the year 1871 *John Forrest* carried on business as a chronometer and watchmaker in *London*. He was in the habit of inscribing on his watches "*John Forrest*, Chronometer-maker to the *Admiralty, London, E.C.*," and established a reputation for the excellence of his goods. He was not, however, chronometer-maker to the *Admiralty*.

On the 15th of February, 1871, *John Forrest* died intestate, and by deed dated the 12th of June, 1871, *Georgina Leitch*, his administratrix, sold and assigned to *Carley & Co.*, a firm of watch and chronometer makers in *London*, "all that the trade and goodwill and other the interest of the said *Georgina Leitch*, as such administratrix as aforesaid, in the business of a watchmaker carried on by the said *John Forrest*, deceased, and all the benefit

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and advantage thereof, with the right to do all such acts and things as she the said administratrix could have done in carrying on the said business." After this assignment *Carley & Co.* continued to carry on their business of watch and chronometer makers, but not under the name nor on the premises of *John Forrest.* They, however, put the name and description of "*John Forrest,* Chronometer-maker to the *Admiralty, London,*" on some of the goods they made and sold.

By deed dated the 7th of February, 1874, *Carley & Co.* granted to *H. Stuart & Co., Limited,* carrying on the business of watchmakers at *Liverpool,* the sole right to make watches with the name "*John Forrest*" thereon for the term of seven years from that date. After the expiration of this license *Carley & Co.* put the name of *John Forrest* on very few, if any, of the watches made by them.

By deed dated the 14th of August, 1890, *Carley & Co.* assigned to one *George Read* the whole of their estate and effects upon trust for the benefit of their creditors; and on the 28th of February, 1891, *George Read,* as such trustee, assigned for value to one *Clemence* the business of *Carley & Co.,* and the goodwill thereof, and he continued to carry it on. The same day *George Read,* as such trustee, in consideration of £20, assigned to the Plaintiff the name, title, and goodwill of the business of *John Forrest,* trading under the style or title of "*John Forrest,* Chronometer-maker to the *Admiralty, London, E.C.*" Under this assignment the Plaintiff, who was a watch and chronometer maker at *Coventry,* claimed the exclusive right to make and sell watches with the name "*John Forrest*" inscribed thereon, and now claimed an injunction to restrain the Defendant, who was also a watchmaker at *Coventry,* and was making and selling watches with the name "*John Forrest*" inscribed thereon, from so doing, and from in any manner representing or doing anything calculated to lead the public to believe that the Defendant was carrying on the business of *John Forrest* or of the Plaintiff.

The Defendant, by his statement of defence, denied that *John Forrest* was chronometer-maker to the *Admiralty,* and alleged that if he traded under that name and description, such trading was a fraud, and that if *Carley & Co.* traded under such name

and description, such trading was fraudulent. The Defendant also contended that if *Carley & Co.* ever had any right to carry on business as "*John Forrest*," such rights were determined by the license granted to *H. Stuart & Co., Limited*, and were never again acquired and did not pass, and could not pass, to *G. Read*; and that as the business of *Carley & Co.* was still being carried on, *G. Read* could not deal with the goodwill in part, but that the whole of the goodwill went with the business. Issue was joined, and this was the trial of the action.

It appeared from the evidence that a trade-mark with the name "*John Forrest*" which the Defendant had registered had by an order of the Court been expunged from the register: *In re Hill's Trade-mark* (1). The other material facts are sufficiently noticed in the judgment.

Sir *R. Webster*, Q.C., and *Sebastian*, for the Plaintiff:—

Goodwill is every advantage connected with the business and the name of the firm. It is "property" and assignable at law. A trade name may be part of the goodwill, and may be subject of bargain and sale, and is not necessarily dependent on the business being carried on at a particular place. If *John Forrest* were alive he could say, "I will sell you my name and introduce you to my customers." That would be property and capable of assignment, even if there were only a small trade or a ruined trade. The suggestion that you cannot have goodwill unless you are carrying on the business is erroneous. The right to put the name "*John Forrest*" on watches was a valuable asset in the hands of *Carley & Co.* They only parted with it for a limited period, and on the expiration of the license it re-vested in them, and it passed as part of their assets under their assignment to *Read*, and he could dispose of it: *Churton* v. *Douglas* (2); *Potter* v. *Commissioners of Inland Revenue* (3); *Kelly* v. *Hutton* (4); *Llewellyn* v. *Rutherford* (5); *Dent* v. *Turpin* (6); *Ford* v. *Foster* (7); *Lindley* on Partnership (8).

(1) 10 Rep. Pat. Cas. 113, 116.
(2) Joh. 174.
(3) 10 Ex. 147.
(4) Law Rep. 3 Ch. 703.
(5) Law Rep. 10 C. P. 456, 469.
(6) 2 J. & H. 139.
(7) Law Rep. 7 Ch. 611.
(8) 5th Ed. Bk. III. Chap. IX. s. 2.

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*Moulton*, Q.C., and *Willis Bund*, for the Defendant:—

It is a fallacy to say that a man may buy the right to put a particular name on goods irrespective of any business. He must earn it, *i.e.*, make it truthful. Continuity in the existence of a firm is the *ratio decidendi* in all the cases where a goodwill and business have been assigned, and there is no distinction in principle between a trade name and a trade-mark when applied to particular goods. The Court will not protect a representation that is not true. The goodwill of a firm so far as it is applicable to goods is one and indivisible, and cannot be cut up into pieces, and where there is no business it cannot be assigned. It is fatal to the Plaintiff's claim that the license was granted in 1874, assuming *Carley & Co.* could grant it, because the right granted to *Stuart & Co., Limited*, to put "*John Forrest, London*," on their watches was a false representation: *In re Wood's Trade-mark* (1); and when *Carley & Co.* became bankrupt they had absolutely no right whatever to make any representation that they made "*John Forrest*" watches, and, therefore, they could not sell such a right. But even if something did pass under the assignment to the Plaintiff, he could make no use of it because he does not carry on business in *London*. It is a false representation of origin within sect. 3 of the *Merchandise Marks Act*, 1887.

*Sebastian*, in reply.

1894. Jan. 22. ROMER, J.:—

The question involved in this action is as to the right claimed by the Plaintiff to put the name of "*John Forrest*" on all the watches manufactured by him, and to restrain the Defendant, and any one else not authorized by him, from putting that name on watches and selling them. Now, the circumstances under which he is said to have acquired that right are these. There was a man named *John Forrest* who carried on in his own name the business of a watch manufacturer in *London*. He used to put on the face of his watches the words "*John Forrest*, Chronometer-maker to the Admiralty, *London, E.C.*" As a matter of fact he was not chronometer-maker to the Admiralty; but I will in this

(1) 32 Ch. D. 247, 263.

judgment disregard the fact, as I intend to decide this case on broader grounds. In February, 1871, he died, and his administratrix sold his business and goodwill to *Carley & Co.* Now *Carley & Co.* never carried on business under the name of "*John Forrest*," or at any house or in any street where *John Forrest* ever carried on business. Nor did they ever use that name in their business except in the following way: Until 1874 on some of their watches, and in particular until the 7th of February, 1874, on the watches they sold to one *James Edey* of *Peebles*, they put the above-mentioned inscription that *John Forrest* used to put on his watches. On the 7th of February, 1874, by indenture of that date, *Carley & Co.* purported to grant to *H. Stuart & Co., Limited*, of *Liverpool*, for seven years from that date, the sole right of manufacturing watches with *John Forrest's* name inscribed thereon, and *Carley & Co.* agreed that during the license they would not manufacture or sell any watches as the watches of *John Forrest*, or with his name inscribed thereon. Accordingly, during those seven years *H. Stuart & Co., Limited*, in the course of and as part of their watch-making business, manufactured and sold watches with the same inscription thereon that I have before mentioned, and *Carley & Co.* ceased to put the name of *John Forrest* on any of their watches. After the expiration of the seven years, and until they failed in 1890, *Carley & Co.* did not put on the watches they made and sold the name of *John Forrest*, except, it is said, on a few. As to those few there is only the evidence of Mr. *Gent*, one of the members of the firm, and the conclusion I come to on his evidence is that, even if his memory does not mislead him as to any watches being so marked, they were so few as to constitute a wholly unsubstantial sale. When *Carley & Co.* failed they assigned their assets to a trustee, Mr. *Read*, for the benefit of their creditors. On the 28th of February, 1891, *Read* assigned to a Mr. *Clemence* the business carried on by *Carley & Co.* at the date of the failure, and its goodwill and the lease of the premises on which *Carley & Co.* had carried on their business. Immediately afterwards, but on the same day, *Read* purported to assign, so far as he lawfully could to the Plaintiffs for £20, "the name, title, and goodwill of the business of *John Forrest*, trading under the style or title

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of *John Forrest*, Chronometer-maker to the Admiralty, *London, E.C.*" Assuming that this last assignment could be said to pass anything, having regard to the prior assignment to Mr. *Clemence*, it is clear to my mind that it could only pass or purport to pass the right to use the name of *John Forrest* as a thing in gross wholly unconnected with any real or substantial business. It is under this assignment that the Plaintiff claims. No doubt the Plaintiff, who was and is a watch manufacturer at *Coventry*, ventured this small sum of £20 for such right to the name of *John Forrest* as *Read* might possibly be able to assign because he had some experience in the name of *John Forrest*. That experience was derived from the fact that prior to the failure of *Carley & Co.*, and without any leave sought or given, he had made for four different customers of his watches on which, by their directions, he had himself put the words "*John Forrest, London.*" The Plaintiff never has carried on business in *London*, nor has he ever carried on business under the name of *John Forrest*, nor has he even since the so-called assignment to him ever used the name in his business except by placing it on some of his watches. Under these circumstances, has the Plaintiff the right contended for him? I think not, and for the following, among other, reasons. *Carley & Co.* undoubtedly bought the goodwill of *John Forrest's* business. Now, speaking generally, a purchaser of a business if he continues it has the right to use the trade name and trade-marks of the business in any way he pleases which is not calculated to deceive. And in particular, as a rule, the purchaser of a business may mark goods made by him in the course of that business with the name of the vendor, although the vendor or his old workmen did not make or assist in making such goods, and by so marking the goods the purchaser would not be considered as doing that which was calculated to deceive his customers or the public. The reason of that is that in most cases, and especially where the purchaser is continuing the business, the mark in the vendor's name might fairly be held to be only a representation that the goods were manufactured in the course of the business without any representation as to the persons by whom that business was being carried on, and there would be no substantial risk of deception.

But in cases where deception would arise, or would probably arise, from the marking of the vendor's name or from the way in which it was marked, then the marking would be fraudulent, and the purchaser could not be heard to say after a course of such fraudulent marking that by having his goods so marked the mark had come to represent goods made by him as the vendor's successor in business. For instance, where the goods sold in a business are of an artistic character and during the vendor's time acquired their reputation and depended for their value upon his personal skill, then, if his retirement from the business were kept secret, a purchaser of his business would not be entitled to sell goods not made by the vendor marked by his name. But I will assume in the present case in favour of the Plaintiff that until the 7th of February, 1874, the watches made by *Carley & Co.*, and marked by them with *John Forrest's* name, were rightly so marked, and that up to that date they could honestly say that watches so marked represented goods made either by *John Forrest* or by his successors in business. I say, I will assume this, as I wish to guard myself from the supposition that I so decide, having regard to the facts, and, in particular, to the fact that *Carley & Co.* marked their watches, not only with "*John Forrest, London,*" but also with the description, "*John Forrest,* Chronometer-maker to the Admiralty." I think that description was marked in order to set forth the personal qualification of the maker, and as a matter of importance, and in order to impress those into whose hands the watches should come with the idea that the watches were made by or under the supervision of one holding the responsible position of chronometer-maker to the Admiralty. And even if *Carley & Co.* could justify their marking of the name of "*John Forrest*" on the ground that it only meant themselves as the successors of *John Forrest,* I do not see how they could at the same time with propriety identify themselves with the description of chronometer-makers to the Admiralty when they were nothing of the kind. But passing this over, and on the assumption I have mentioned, how did matters stand on the expiration of the seven years' license? During those seven years *H. Stuart & Co., Limited,* were expressly authorized by *Carley & Co.* to manufacture and sell watches

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stamped with the name of "*John Forrest, London.*" That company, who carried on business in their own name, were not *John Forrest* or successors in the business of *John Forrest*, and were carrying on business at *Liverpool* and not in *London*, and this to the knowledge of *Carley & Co.* How after that could *Carley & Co.* be heard to assert that the name of "*John Forrest, London,*" on watches still represented and meant that the watches were made either by *John Forrest* or by his successors in business? To so assert would be to admit that they had authorized the *Liverpool* company to commit a fraud on the public. The deed of the 7th of February, 1874, did not assign, or purport to assign, any business, or any part of the business of *Carley & Co.*, to the *Liverpool* company. It was a mere grant of a license to use the name of *John Forrest*, and I need scarcely say that, apart from other objections to the license purported to be granted, a trade name or mark cannot be validly assigned in gross. When the license expired *Carley & Co.*, who had ceased during the seven years to use the name of *John Forrest* in any way whatever in their business, had, in my opinion, lost any right they might before have had to say that any person marking watches "*John Forrest*" thereby represented that they were watches manufactured by them or in the course of their business: see *In re Wood's Trade-mark* (1), and particularly the observations of Lord Justice *Lindley* (2). This being the position of affairs at the end of the license, certainly *Carley & Co.* did not by the time of their failure regain any right, even if they could possibly have done so; for, as I have pointed out, there was in the meantime no substantial manufacture or sale by them of watches so marked. And if they at the date of their failure had no such right, they could not assign it to *Read*, nor could *Read* assign it to the Plaintiff. And if *Carley & Co.* had no such right at the time of their failure, they could not then have obtained an injunction against the Defendant for stamping watches with the name "*John Forrest,*" nor could the Plaintiff acquire through them the right to such an injunction, even if he had acquired all their business. For all that the Defendant is doing that can be complained of by the Plaintiff is marking his watches with *John*

(1) 32 Ch. D. 247. (2) 32 Ch. D. 260.

*Forrest's* name. That is, in my opinion, a very improper proceeding, because it is a fraud on the public; but it does not enable the Plaintiff to support this action. To entitle the Plaintiff to an injunction, he must have been able to establish (there being no question of trade-mark) that such marking by the Defendant was calculated to deceive the public or customers into the belief that the goods so marked were goods made in the course of the business belonging to the Plaintiff, and this he could not do for the reasons I have pointed out. But the matter does not stop there. Even assuming that *Carley & Co.*, or *Read*, as their trustee, could, if no assignment had been made, have restrained the Defendant, the Plaintiff, who, in my opinion, can only claim to be a mere assignee in gross of the right to the name "*John Forrest*," cannot sue the Defendant. The Plaintiff is in no real or true sense an assignee of the business of *Carley & Co.*, or of any severed or severable part of it. The wording of the so-called assignment to him is relied on by him, and in particular the use of the word "goodwill." But the words used meant nothing more than that *Read* proposed to transfer, if and so far as he could, to the Plaintiff the right to the mere name of *John Forrest* and such advantage, if any, as could be said to attach to such a right. As I have before pointed out, the right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public, nor can any advantage whatever as against the public attach to any attempted assignment of the sort. Lastly, I should point out that ever since the death of *John Forrest, Carley & Co.* and those claiming through them have never used the name of *John Forrest* except by stamping it on goods—that is to say, as a trade-mark. They could not insist that it was or is a trade-mark or claim rights on that ground for many reasons—one of which is that they have never registered or applied to register it under the *Trade Marks Acts*. And not being able to do this, still less could or can they do what in substance the Plaintiff is seeking to do in this action —namely, treat a name as being property in itself which gives a right of action against any person using the name without their permission wholly irrespective of any other consideration. I need not deal with further defences raised by the Defendant. I

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have stated sufficient to shew why, in my judgment, the action should be dismissed, and I accordingly dismiss it. But having regard to the conduct, or rather misconduct, of the Defendant in relation to his use of the name "*John Forrest*," I dismiss the action without costs.

Solicitors for Plaintiff: *A. H. Arnould & Son*, agents for *Buller & Cross, Birmingham.*

Solicitors for Defendant: *Crowders & Vizard*, agents for *Browetts, Coventry.*

H. L. F.

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## MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY *v.* RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

[1891 M. 3282.]

*Estoppel by Record—Assistance in defending previous Action—Privies in Estate—Debenture-holders—Compromise—Majority binding Minority—Receipt of Shares for Debentures.*

A resolution, purporting to be in pursuance of a power to compromise contained in a debenture trust deed given by an American company, was passed by a majority of the debenture-holders, such resolution being in favour of accepting, in lieu of the debentures, shares in an English company which had purchased the undertaking and property of the *American Company*, and covenanted to indemnify that company against its debts and obligations.

The *Mercantile Company*, who were debenture-holders who had dissented from the resolution and had not attended the meeting at which it was passed, recovered judgment against the *American Company* for arrears of interest due on their debentures, on the ground that there were no circumstances of difficulty which brought the power of compromise into play so as to enable the majority of debenture-holders to bind the dissentient minority.

The *English Company* assisted in the defence of this action, and, when the defence failed, paid the costs.

In a subsequent action, the *Mercantile Company*, suing on behalf of all the debenture-holders, sought to enforce against the *English Company* and the lands assigned to them by the *American Company* the charge on such lands purported to be given by the debentures.

Through want of registration in *Mexico*, in which the lands were, the debenture-holders had never acquired a charge on the lands valid according

to the law of that country; and registration of the *English Company's* title was not completed until after judgment in the former action:—

*Held*, that the *English Company* were not estopped by the judgment in the former action from adducing evidence to shew that, through non-registration of the debenture-holders' charge and otherwise, circumstances had existed which were sufficient to bring the power of compromise into operation, and that the resolution was binding on the Plaintiffs.

A purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against his vendor commenced after the purchase. And when such purchaser has given the vendor an indemnity, and has assisted him in defending an action brought by a third person, the purchaser is only estopped in subsequent proceedings between the vendor and the purchaser.

THE *International Company of Mexico* (below called the "*American Company*") was constituted, under a special charter of the State of *Connecticut*, to carry out concessions granted by the Government of *Mexico*, under which concessions and certain purchases the *American Company* acquired the title to about 17,500,000 acres of land in *Lower California*, in the *Republic of Mexico*.

In response to a prospectus issued in March, 1888, by the *American Company* and the *River Plate Trust, Loan, and Agency Company* (an English company which is below called "the trustee" or "the *Trustee Company*"), the *Mercantile Investment and General Trust Company, Limited* (an English company which is below called the "*Mercantile Company*"), applied for 125 debentures, part of an issue of $3,000,000, which were part of a total of $5,000,000 Twenty Year Gold Debentures of the *American Company*, which, according to the prospectus, were secured by a trust deed. The price of issue was £94 per debenture of $500, and the debentures bore interest at £6 per cent. per annum, payable on the 1st of January and the 1st of July, and were repayable in 1908, or by earlier drawings, at the rate of £102 for each debenture.

The 125 debentures were allotted to the *Mercantile Company*, which paid £11,750 for them, and in the whole 6992 of such debentures were issued.

By the trust deed referred to above, which was dated the 10th of March, 1888, and was made between the *American Company* of the first part, the trustee of the second part, and *J. Morris*,

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*E. M. Denny*, and *J. W. Todd* (therein and below called "the committee") of the third part, after reciting the creation of a previous issue of debentures (all of which were subsequently paid off), and the determination to create the debentures referred to in the prospectus, and that, to further secure payment of the moneys thereby secured, the *American Company* had "agreed to make a special hypothecation in favour of the trustee of all and singular the said 17,500,000 acres of land in *Lower California*," subject only to a deed of the 1st of June, 1887, to secure the previous issue (and the provisions of which deed subsequently ceased), and that, "by way of further assurance and to secure the principal moneys and interest owing upon the debentures," the *American Company* had "given a power of attorney to the committee to constitute a special hypothecation of the said lands in *Lower California*," it was witnessed, that in consideration of the premises the *American Company* covenanted with the trustee and its assigns that all and singular the said 17,500,000 acres of land in *Lower California* aforesaid should "stand and be charged with the payment of the principal moneys and interest payable according to the tenor of the debentures, and that such principal moneys and interest" should "be a first charge on the said premises subject only to the said indenture of the 1st of June, 1887, and the money thereby secured and to" certain "provisions for free sale of land." And it was thereby further witnessed and agreed and declared (*inter alia*) as follows:—

By clause 1, that the *American Company* would pay to the persons who, according to the purport and tenor of the debentures and coupons thereto, should be entitled to receive the same, the principal and interest of the debentures, and would pay over to the committee (subject as therein mentioned) half the net proceeds of sale of lands, to be applied as therein provided, and would perform and observe the covenants and provisions in the debenture and the trust deed, on the part of the company to be observed and performed.

By clause 3, that the committee should be entitled to have an office in *London*, with a secretary and other officers, to be paid for out of a sum to be provided by the *American Company*.

Clause 5 provided for the registration in *Mexico*, by the trustee

at the request of the committee, of the hypothecation to be given by the *American Company* to the trustee of the lands in *Lower California.*

Clauses 8 and 9 provided for the sale of the lands by the *American Company* until one of certain events, *e.g.*, default in payment or winding-up, had happened.

Clause 10 provided for cancellation after the hypothecation had been inscribed, and until default by the *American Company*, of portions of the charge affecting lands sold.

Clause 15 provided for the application of moneys coming to the hands of the committee and trustee. After entry into possession by the trustee, the moneys coming to the trustee (whether from the committee or otherwise under the trustee's powers) were to be applied in payment to the debenture-holders *pari passu.*

The other material clauses were as follows:—

Clause 21: "The committee may from time to time, whenever they shall think fit, convene a meeting of the debenture-holders to be held in the City of *London.* The notice convening the meeting shall state the business to be transacted thereat, and shall be given at least fourteen days before the date at which the meeting is to be held, and every such meeting shall be presided over by a member of the committee; and in case any member thereof shall not be present, then the debenture-holders present shall elect one of their number to preside, and, subject to any special provisions herein contained, the meetings of the debenture-holders shall be conducted, as nearly as the circumstances of the case permit, in the manner applicable to the meetings of the shareholders of a company incorporated under the *Companies Act* (25 & 26 Vict. c. 89), and having for its regulation the provisions contained in the Table marked A in the 1st schedule to the said Act."

Clause 22: "A meeting of debenture-holders shall, in addition to any other powers hereby given, have the following powers:—

"(1.) Power, at any time after such entry as aforesaid, to give authority to the trustee to give up possession of the said lands to the company, either unconditionally, or upon any conditions that may be arranged between the

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company and the committee with the sanction of a special resolution;

"(2.) Power to sanction the release of any of the mortgaged premises;

"(3.) Power to sanction any modification or compromise of the rights of debenture-holders against the company, or against its property, whether such rights shall arise under the debentures or under these presents."

Clause 23: "The expression 'special resolution,' when used in these presents, means a resolution passed, at a meeting of debenture-holders duly convened and held in accordance with the provisions herein contained, by a majority consisting of not less than three-fourths of the persons present and entitled to vote thereat. Provided that, in computing the majority, when a poll is demanded, reference shall be had to the number of votes to which every such person is entitled under these presents."

Clause 24 provided that at a meeting of debenture-holders all questions should be decided by a show of hands, unless a poll should be demanded, and that in such case the poll should be taken in such manner as the chairman should direct. It also provided for voting by proxy, and concluded as follows: "A special resolution shall bind all debenture-holders, whether present at the said meeting or not, and whether voting for or against, or assenting to or dissenting from, any such resolution, and, moreover, shall be as effectual as if all such debenture-holders were competent to consent and had consented thereto: Provided always, that the holders of not less than one-half in value of the debentures for the time being outstanding and qualified to vote as hereinafter mentioned are present or represented."

The 1st schedule consisted of a short description of the lands in *Lower California*, and the 2nd schedule contained a form of the debentures, which provided that the *American Company* should on the 1st of January, 1908, or at such earlier date as the principal moneys thereby secured became payable, pay to the bearer, or to the registered holder, $500 in gold coin of the *United States* of *America*, or, at the option of the bearer

or registered holder, in sterling money at the rate therein mentioned, and should in the meantime pay interest on such principal sum at £6 per cent. per annum, on the 1st of January and the 1st of July in each year. The debentures also provided that the holders of the several debentures of the series were entitled *pari passu* to the benefit of, and were subject to the provisions contained in, the trust deed.

The deed gave the debenture-holders no charge on the land valid or binding according to the law of *Mexico*, as the charge was not registered.

In 1889 the *Mexican Land and Colonization Company, Limited* (below called "the *English Company*") was registered in *England* under the *Companies Acts*, with a nominal capital of £2,000,000, divided into shares of £10 each, one of the objects, and the principal one, being to acquire the whole of the property of the *American Company*.

By an agreement dated the 4th of May, 1889, and made between the *American Company* of the one part and the *English Company* of the other part, it was agreed, by clause 1, that the *American Company* should transfer and sell, and the *English Company* should accept a transfer of and purchase, first, all the concessions belonging to the *American Company* or claimed by it or by any person or corporation in trust for it; secondly, all the land, estates, properties, chattels, *choses in action*, and effects in the widest sense then belonging to or held by the *American Company* or by any person or persons in trust for it; fifthly, all the debentures of the *American Company*, created but unissued, of the nominal value of $2,000,000 or thereabouts; and, sixthly, the goodwill of the business of the *American Company* and all other, if any, its property and undertaking of any kind or description, whatsoever or wheresoever, either held by it itself or by any corporation or firm in trust for it, "subject however to the mortgage, lien, or charge now existing upon a portion of the property of the *American Company* situate in *Lower California* to secure the debentures or bonds of the *American Company* now outstanding, of the nominal value of $5,000,000, and more particularly referred to in" the deed of the 10th of March, 1888.

By clause 2, the consideration for sale was to be "the under-

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taking by the *English Company* of all the responsibility and liability of the *American Company* to pay the said debentures and the interest thereon, and the undertaking by the *English Company* of all the obligations, debts, engagements, and liabilities properly incurred by or existing against the *American Company*, and the allotment to the several persons who at the day of the date hereof are the stockholders in the *American Company*, or to the nominees of such persons respectively, of shares of the *English Company*" at the rate of one fully-paid £10 share in the *English Company* for each share of $100 in the *American Company*.

Clause 4 was as follows:—

"The *English Company* shall undertake and pay all moneys to become due in respect of the said debentures for $5,000,000, whether principal or interest, and shall also undertake and pay fulfil and satisfy all the obligations and debts, engagements, and liabilities properly incurred by or existing against the *American Company*, subject to such exceptions and defences as the *American Company* may be entitled to oppose in the enforcement thereof, and shall indemnify the *American Company* against payment of the said debentures, debts, and interest, and from and against all actions, claims, and demands in respect of such debts, obligations, engagements, and liabilities, or any of them."

Clause 5 provided that the *American Company* should forthwith take the necessary steps for winding up and dissolving the company.

By clause 9, the *American Company* was forthwith to hand over to the *English Company* its common seal, and all charters, concessions, books, accounts, correspondence, papers, documents, and vouchers of every kind or description connected with or relating to the *American Company*.

The 1st schedule to the agreement comprised particulars of the property agreed to be sold, including the 17,500,000 acres in *Lower California*, less the land sold by the *American Company* since the execution of the trust deed.

By a notarial act of transfer dated the 11th of May, 1889, the *American Company* irrevocably ceded and transferred to the *English Company* the properties, privileges, rights and concessions

therein mentioned, including the land in *California*, subject to the mortgage lien or charge then existing thereon to secure the debentures then outstanding of the nominal value of $5,000,000, referred to in the trust deed, the consideration being the same as that stated in the agreement.

By an indenture dated the 20th of September, 1889, and made between the *English Company* of the one part, and *W. E. Strickland* (who was the secretary to the committee) of the other part, after reciting that the *English Company* were desirous that the holders of the debentures of the *American Company* should exchange their debentures for first preference shares of the *English Company*, it was agreed that, if holders of one-half in value of the debentures outstanding should attend or be represented at a meeting of debenture-holders, and if such meeting should pass a resolution approving the proposal for conversion, the *Trustee Company* should give up possession to the *English Company* of the lands and property upon which the debentures were charged, and should execute all instruments and things necessary for releasing such lands and property from such charge; and clause 6 provided that "upon the said land and property charged as aforesaid by the said debentures being released to the *English Company* as herein provided, the *English Company* shall allot to every debenture-holder surrendering his debentures, with all outstanding coupons attached, first preference shares of the said issue" of £10 each at the rate of £110 in shares for every £100 in debentures surrendered.

On the 8th of October, 1889, a meeting of the debenture-holders was held in *London*. No poll was demanded, and the following resolution was passed by a majority sufficient to make it binding if it was *intrà vires*:—

"That all rights of the debenture-holders of the *International Company of Mexico*, whether against its property or against the company, be compromised by the acceptance, in lieu of such debentures and the coupons accrued and not due, and in discharge of such rights, fully paid £6 per cent. cumulative preference shares (entitled to dividend as from the 1st of July, 1889) in the *Mexican Land and Colonization Company, Limited*, at the rate of £110 in shares for every $500 in debentures, in accordance

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with the proposal dated the 20th of September, 1889, and that the deed dated the 20th of September, 1889, between the company and Mr. *W. E. Strickland*, referred to in such proposal, be approved and confirmed, and be forthwith carried into effect."

The *Mercantile Company* did not attend the meeting or vote thereat; and they always dissented from the resolution passed.

The *English Company* paid the interest which became due on the debentures on the 1st of July, 1889; but default was made in payment of the half-year's interest due on the 1st of January, 1890, and on the 13th of January, 1890, the *Mercantile Company*, suing alone, commenced an action [1890 M. 98] against the *American Company* only, to recover this interest.

The *American Company*, by their defence, pleaded the resolution of the 8th of October, 1889, and that "the land and property so charged as aforesaid mentioned have been duly released as aforesaid, and thereupon all rights and remedies of the debenture-holders (including the Plaintiffs if they have any debentures) by virtue of their debentures, whether as against the same land and property or as against the Defendant company or the *English Company*, came to an end, and the Plaintiffs' debentures (if any) confer only a right to allotments of preference shares in accordance with the deed of the 20th of September, 1889."

And the Defendants delivered a counter-claim for—

"1. A declaration that the said resolution of the 8th of October, 1889, is binding on the Plaintiffs as holders of any debentures, and that the said arrangement embodied in the said deed of the 20th of September, 1889, is binding on the Plaintiffs as holders of any debentures.

"2. A declaration that all rights and remedies of the Plaintiffs, as debenture-holders, by virtue of their 125 debentures (if any), or any they may have acquired or may hereafter acquire, whether against the said land and property or as against the Defendant company or the *English Company*, are at an end, and that their debentures (if any) must be deemed to confer only a right to an allotment of preference shares in accordance with the said deed of the 20th of September, 1889."

At the trial Mr. Justice *Day* gave judgment for the Defendants, making a declaration that the resolution and the arrange-

ment were binding on the Plaintiffs; that the Plaintiffs' rights and remedies as debenture-holders, whether against the lands and property referred to in the debentures and the debenture trust deed, or as against the *American Company*, were at an end, and that the debentures must be deemed to confer only a right to an allotment of preference shares in the *English Company*, in accordance with the deed of the 20th of September, 1889.

The Court of Appeal, however, on the 3rd of July, 1891, reversed the judgment of Mr. Justice *Day*, and made a declaration (in lieu of that in his judgment), that the resolution of the 8th of October, 1889, was invalid and not binding on the Plaintiffs, and that judgment must be entered for the Plaintiffs with costs in both Courts: *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1). In the course of his judgment Lord Justice *Lindley* said: "The debenture-holders did not become creditors of the *English Company*, although they had a charge on the land in *California* transferred to that company; and, in the absence of evidence to the contrary, it must be assumed that the debenture-holders could have enforced their security against those lands after the transfer to the *English Company* as effectually as they could before. There is no evidence to shew that the debenture-holders had any difficulty in obtaining the interest on their debentures, nor that such interest would not have been paid, in fact, regularly if matters had been left as they stood" (2). His Lordship also said that the circumstances were not such as to bring the power to bind the minority into play (3).

Although the *American Company* defended the action, the *English Company*, though not parties, assisted in the defence, and when it failed paid the costs.

On the 4th of November, 1891, the *Mercantile Company* brought an action, on behalf of themselves and all other holders of the 6 per cent. debentures, against the *Trustee Company*, the members of the committee, the *American Company*, and the *English Company*, claiming (*inter alia*) (1.) an account of interest in arrear, and payment thereof by the *American Company*; (2.) a declaration

(1) [1893] 1 Ch. 484, n. (2) [1893] 1 Ch. 487, n.
(3) [1893] 1 Ch. 490, n.

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that under the trust deed the Plaintiffs and all other holders of outstanding debentures were entitled to a first charge on the land and property comprised in the trust deed, and to have all acts and deeds done and executed which were necessary to make the charge effectual; (3.) an account of what was due on the outstanding debentures; (4.) execution of the trusts and realization of the property; (5.) accounts of purchase-moneys received; (6.) a declaration that the committee and the *Trustee Company* had been guilty of wilful neglect and default in having failed to procure registration of the hypothecation to the *Trustee Company*, and to put in force the trust deed, and an inquiry as to the loss thereby occasioned; but these charges were withdrawn in the course of the trial. The name of the *American Company* as Defendants was afterwards struck out, and they did not appear at the trial.

Paragraph 14 of the statement of claim alleged that the notarial act of transfer of the 11th of May, 1889, was "perfected according to the law of *Mexico*"; and paragraph 21 alleged that, "by virtue of the said notarial act the *English Company* became the owners, according to the law of *Mexico*, of the land and property therein comprised"; but there was evidence at the trial that registration in *California* of the *English Company's* title was not effected till September, 1891, after the judgment of the Court of Appeal in the former action.

By paragraph 3 of their defence, the *English Company* pleaded that the resolution of the 8th of October, 1889, and the deed of the 20th of September, 1889, "were and are respectively, in so far as they purport to sanction or effect a release of the land comprised in the said trust deed, binding upon the Plaintiffs"; and by paragraph 11 of their defence they alleged, as one of the grounds of their defence, that the land expressed to be comprised in the trust deed being situate in a foreign country, out of the jurisdiction of the Court, the Court had no jurisdiction to grant any such relief as was asked by the 2nd, 3rd, 4th, or 5th paragraph of the claim for relief.

In reply, the Plaintiffs said that the judgment of the Court of Appeal of the 3rd of July, 1891, bound the *English Company*, and estopped them from raising the defence raised in paragraph 3 of

their defence, but that, if it were otherwise, the resolution and deed were not a release within the provision in the trust deed mentioned in that paragraph.

The action was tried, with witnesses, before Mr. Justice *Romer* on the 11th, 12th, 13th, and 14th of December, 1893.

Notwithstanding the contention of the Plaintiffs as to the *English Company* being estopped by the judgment of the Court of Appeal, evidence was admitted which satisfied the Court of the difficulties which occasioned the special resolution, viz., that "neither the *American Company* nor the *English Company* had any available means for paying the interest on the debentures"; that "the interest that had been paid had only been provided by the hands of certain gentlemen who would certainly not have continued to provide moneys if the debenture-holders had insisted on their rights; that registration of the charge could only have been effected, if at all, with great difficulty, and probably after considerable litigation, and at great expense, and that there were no moneys available for the purpose; that if registration had been effected the charge could only have been utilized for the benefit of the debenture-holders with difficulty, and after considerable time and expenditure;" and that, if the resolution had not been carried, the *English Company* would probably have gone into liquidation, and the debenture-holders would have lost both their security and their money.

*Cozens-Hardy*, Q.C., *Chadwyck Healey*, Q.C., and *Vernon R. Smith*, for the Plaintiffs:—

The charge, or contract for a charge, given by the trust deed and debentures can be enforced against the property in the hands of the *English Company*. The judgment of the Court of Appeal in *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (1) was binding on the *American Company* as parties to that action; and inasmuch as the *English Company* are privies in estate with the *American Company*, if they were not virtually parties to the former action, they are estopped from saying that the Plaintiffs are not creditors of the *American Company*, or have not a charge on their property. The *English*

(1) [1893] 1 Ch. 484, n.

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*Company* would be estopped even if they had acquired a complete title to the lands charged before that judgment; but their title was not completed until after the judgment had been pronounced.

*Crackanthorpe*, Q.C., and *Kirby*, for the *English Company*:—

Assuming that the *English Company* are not estopped by the judgment of the Court of Appeal in the former action, the evidence in this case shews a case of difficulty sufficient to bring it within the power of compromise given by the trust deed to the majority of the debenture-holders: *Sneath* v. *Valley Gold, Limited* (1); *Mercantile Investment and General Trust Company* v. *International Company of Mexico* (2).

No doubt, privies in estate are bound: *Duchess of Kingston's Case* (3). But in this case judgment was not obtained until after the transfer of the assets to the *English Company*, and privies in estate are not bound by a judgment unless it precedes the creation of the interest which is to be estopped: *Doe* v. *Earl of Derby* (4); *Taylor* on Evidence (5).

The *English Company* are not estopped because they defended the action; the *American Company* were the only Defendants on the record.

[ROMER, J.:—Is it not the Plaintiffs' case that, as between the two companies, the *English Company*, if sued on the indemnity, would have been estopped by the judgment?]

That is the effect of the Plaintiffs' argument. The *English Company* are only in the same position as if they had been third parties; but they were not in the position of Defendants: *Eden* v. *Weardale Iron and Coal Company* (6); *Edison and Swan United Electric Light Company* v. *Holland* (7). If the *American Company* had been taken away and the *English Company* substituted for them, there would be something to be said for the doctrine of estoppel; but there was no such substitution. The retainer of the solicitors who defended the action was from the *American Company*, which was then, and still is, a going company.

(1) [1893] 1 Ch. 477.
(2) Ibid. 484, n.
(3) 2 Sm. L. C. 9th Ed. p. 812.
(4) 1 A. & E. 783.
(5) Part III. Chap. IV., s. 1639.
(6) 35 Ch. D. 287.
(7) 41 Ch. D. 28.

Moreover, the plaintiffs in the former action were the *Mercantile Company*, whereas that company is now purporting to sue on behalf of all the debenture-holders.

Estoppel is only admitted as part of our law in order to secure finality in litigation. One principle inseparable from the doctrine is that it must be mutual: *Spencer* v. *Williams* (1). If the previous action had been decided in favour of the defendants therein, the plaintiffs in that action would now have been dropped and some other debenture-holder would have been substituted; and as against the plaintiffs in such an action estoppel could not have been set up.

A covenant to indemnify against debts is a totally different thing from a covenant to give a charge. If under a covenant to pay by way of indemnity the original creditor sues the debtor successfully, the debt so established may be used as the measure of liability of the person who has to indemnify: *Duffield* v. *Scott* (2); *Roscoe's* Nisi Prius (3). But a surety is not bound by anything that takes place between the principal and debtor unless he is a party to the action: *Parker* v. *Lewis* (4).

In any action by the *American Company* against the *English Company* for the amount of the interest the Plaintiffs therein could say that the amount ascertained in the former action could not be disputed. But the establishment of the debt in the former action cannot be used in support of a contention that there is a right to a charge. The Plaintiffs have no charge even if the resolution did not bind them, for there has been no registration as required by the law of *Mexico*. Such registration cannot now be effected, and the Plaintiffs could only succeed if they shewed a binding contract to give a valid charge; the mere fact that the *English Company* purchased with notice from the defendants in the former action is not sufficient to support a case against the so-called privies in estate: *Norris* v. *Chambres* (5).

And such a contract or covenant would only bind the land so far as it was of a negative nature: *London and South Western*

(1) Law Rep. 2 P. & M. 230, 237.
(2) 3 T. R. 374.
(3) 16th Ed. p. 571.
(4) Law Rep. 8 Ch. 1035.
(5) 29 Beav. 246; 3 D. F. & J. 583.

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*Railway Company* v. *Gomm* (1); *Haywood* v. *Brunswick Permanent Benefit Building Society* (2). No amount of notice will help the Plaintiffs: *Norton* v. *Florence Land and Public Works Company* (3).

The land said to be affected with a charge is situated in a foreign country, and in the absence of fraud, trust, or contract, this Court has no jurisdiction to enforce a claim against it: *British South Africa Company* v. *Companhia de Moçambique* (4); *Penn* v. *Lord Baltimore* (5). The principle laid down in *Lord Cranstown* v. *Johnston* (6) should not be extended.

[They also referred to *Tulk* v. *Moxhay* (7); *Wenman* v. *Mackenzie* (8); *Martin* v. *Martin* (9); *Smith* v. *Widlake* (10); *Prettyman's Case*, cited in *Walton* v. *Stamford* (11).]

*Neville*, Q.C., *W. F. Hamilton*, and *F. Whinney*, for the committee:—

Either the debenture-holders or the *Trustee Company* had a charge on the Mexican lands. But the resolution of the 8th of October, 1889, bound all the debenture-holders, and the judgment of the Court of Appeal does not estop these Defendants from raising this contention. That was a judgment *inter partes* in an action to which the Defendants and the *Trustee Company* were strangers, and such a judgment is inadmissible as evidence against strangers except where public rights are concerned: *Taylor* on Evidence (12).

But the *English Company* were not bound. As guarantors they would, under the old practice, have been invited to defend the action: *Parker* v. *Lewis* (13). Under the present practice they should have been served with a third party notice: Rules of Supreme Court, 1883, Order XVI., r. 48, App. B 1. A surety may require a debt to be proved against himself although the creditor has already established it against the principal debtor: *Ex parte Young* (14). Both the Plaintiffs and Defendants in this action

(1) 20 Ch. D. 562.
(2) 8 Q. B. D. 403.
(3) 7 Ch. D. 332.
(4) [1893] A. C. 602.
(5) 1 Ves. Sen. 444.
(6) 3 Ves. 170.
(7) 2 Ph. 774.
(8) 5 E. & B. 447.
(9) 2 Russ. & My. 507.
(10) 3 C. P. D. 10.
(11) 2 Vern. 279.
(12) Part III. Chap. IV., ss. 1682, 1683.
(13) Law Rep. 8 Ch. 1035, 1059.
(14) 17 Ch. D. 668.

are different from those in the former action, and are not bound by the findings of fact therein.

*Finlay*, Q.C., and *Creed*, for the *Trustee Company*.

*Cozens-Hardy*, in reply :—

The *English Company* were really the defendants to the former action—they were not merely standing by and assisting the *American Company*. The *English Company* having taken the assets and liabilities, the *American Company* had no longer any substantial interest in the matter. The *American Company* agreed with the debenture-holders to give them a valid charge on the land, and that agreement is enforceable in this country. And the *English Company's* agreement with the *American Company* to fulfil all its obligations includes giving the debenture-holders a valid hypothecation and charge upon the land. The *English Company* would be estopped from saying, in any action between them and the *American Company*, that the amount found due in the former action was not due, or from going behind the declaration of that Court as to the effect of the resolution, and we stand in the same position as against the *English Company*.

[ROMER, J. :—Judgment in an action between *A.* and *B.* could not *primâ facie* affect *C.* But it does affect *C.* if he is privy in estate, claiming through *B.* The only other exception to the general law appears to be the case of an express indemnity from *C.* to *B.*, and that appears to be limited to a case where the subsequent proceedings are between the person who indemnifies and the person indemnified. Is there any other exception?]

I do not know of any other; but the *English Company* were privies in estate; for the registration of the *English Company's* title in *California*, which is the only thing that makes them privies, did not take place until after the judgment of the Court of Appeal.

[*Crackanthorpe*, Q.C. :—The Plaintiffs' claim states the notarial act of the 11th of May, 1889, and says that by virtue of such notarial act the *English Company* became owners.]

But the Defendants' own witnesses have now proved that the

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*English Company's* title was not completed till September, 1891. The declaration in the Court of Appeal was made on the counter-claim, which raised the exact point whether there was a charge or not, and such declaration is binding on the *English Company*.

[ROMER, J.:—Has the doctrine as to privity of estate ever been held to apply to land abroad.]

I do not think it has; but it is exceedingly good sense to so apply it.

As to the objection that the sole right which the Court has to do with in dealing with foreign land is a right based on contract, it has been laid down that the cases "clearly shew that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in *England*": *Lord Cranstown* v. *Johnston* (1). This is not like *Norris* v. *Chambres* (2) and that class of cases, where the vendor purports to sell free from the contract. There was no such case for a compromise here as in *Sneath* v. *Valley Gold, Limited* (3).

1894. Jan. 15. ROMER, J.:—

The first question to be considered is whether the Defendants, the *Mexican Land and Colonization Company, Limited* (a company I shall for brevity refer to as "the *English Company*"), are estopped by the judgment in the action brought by the Plaintiff company against "the *American Company*"—the *International Company of Mexico*. Now, the *English Company* were not parties to that action, and, *primâ facie*, are not bound by the judgment. The *American Company* defended that action. The *English Company*, by reason of the covenant of indemnity given by them, were interested in assisting the *American Company*, and accordingly they did assist the *American Company* in their defence and counter-claim, and, when the *American Company* failed, paid their costs. But this in itself did not put the *English Company* in the position of Defendants to that action, or estop them in the present action.

(1) 3 Ves. 170, 182. (2) 29 Beav. 246; 3 D. F. & J. 583.
(3) [1893] 1 Ch. 477.

But then it is said that the *English Company* are bound, as being "privies in estate" of the *American Company*, the estate being the land in *Mexico* purporting to have been charged in favour of the debenture-holders. But it is not in dispute that throughout that action the debenture-holders had no charge on the land valid or binding according to the law of *Mexico*. In that action the Plaintiff company were only seeking to enforce in this country a personal claim againt the *American Company*; and the *American Company* in their defence and counter-claim were seeking to free themselves and their assets, including the land in question, from a personal claim, and not from a claim constituting, if established, a valid charge on the land. Nothing was decided in that action which in any way bound the land, and I cannot see how the *English Company*, even if they could be regarded as having acquired the land subsequent to the judgment, can be said to be estopped, as purchasers of that land, by a judgment in no way binding the land. Moreover, if the claim of the Plaintiff company could be regarded as one affecting the land, notwithstanding that no registration of that claim had been made in *Mexico*, which alone could validly bind the land there, then the *English Company* would be entitled to say that they were purchasers of the land prior to that action, notwithstanding that their title may also not have been perfected by registration. A prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase.

Lastly, it was said that, inasmuch as the *American Company* defended with the knowledge and approval of the *English Company*, the latter would be estopped under their covenant of indemnity from disputing the judgment as against the *American Company* suing them on the express covenant of indemnity. That is quite true. But this is not an action on the covenant of indemnity. The estoppel last referred to is only between the party indemnifying and the party indemnified, and arises only by virtue of a term implied in an express covenant of indemnity, as was pointed out in the case of *Parker* v. *Lewis* (1). In the present case, not only are the *American Company* not suing, but

(1) Law Rep. 8 Ch. 1035.

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they are not even parties to the action. The Plaintiffs are suing the *English Company* on grounds which, the Plaintiffs maintain, make the *English Company* directly liable to them, and not merely to the *American Company*. In such an action I can find no grounds for estoppel merely because the *English Company* may be estopped as against the *American Company* if and when the latter sue on their covenant of indemnity. And nothing that I decide now will affect the *American Company* should they sue, or will affect the Plaintiff company so far as they seek to enforce, as against the *American Company*, the judgment they have obtained against that company.

For these reasons, I think that the *English Company* are not estopped as against the Plaintiffs, and are at liberty to try in this action the question whether the debenture-holders are not bound by the resolution passed on the 8th of October, 1889, and to rely on the evidence bearing on that question which has been given by the Defendants in this action.

Having that evidence before me, I have come to the conclusion that the Plaintiffs are bound by the resolution of the 8th of October, 1889. The Defendants have, in my opinion, succeeded in bringing this case within the authority which has been cited of *Sneath* v. *Valley Gold, Limited* (1), and by the principles of that authority I am, of course, bound. No doubt the facts of this case are not identical with, or so strong in favour of, the debenture-holders being bound, as those which occurred in the authority referred to. But what I have to consider is not whether, if the debenture-holders did not accept the resolution, they would altogether lose their security or all chance of being paid, but whether there were not difficulties in the way of their enforcing their rights of so substantial a character that the majority of debenture-holders might *bonâ fide* come to the conclusion that it was desirable, in face of those difficulties, to compromise those rights on the terms of the resolution. And on the facts established before me I think there were such difficulties. I think the position of affairs was such that under the trust deed the debenture-holders had the right, if they were so minded, to compromise their rights

(1) [1893] 1 Ch. 477.

against the *American Company* and that company's property, and to pass the resolution of the 8th of October, 1889. And I see no reason to doubt that that resolution was honestly arrived at, and was *bonâ fide* passed at the meeting by the necessary majority, acting solely in what they believed to be the interests of the debenture-holders. The difficulties I have referred to are these: Neither the *American Company* nor the *English Company* had any available means for paying the interest on the debentures. The interest that had been paid had only been provided by the hands of certain gentlemen, who, I think, would certainly not have continued to provide moneys if the debenture-holders had insisted on their rights. Registration in *Mexico* of the charge of the debenture-holders, which was necessary to make it valid, could only have been effected, if at all, with great difficulty, and probably after considerable litigation and at great expense, and there were no moneys available for the purpose in the hands of the trustees of the debenture-holders, or, so far as I can see, obtainable by them. The Mexican Government might have objected to such registration, and possibly after all efforts registration might never have been effected. And I remark that the counsel for the Plaintiffs was obliged to admit at the beginning of his reply that the case against the trustees of the debenture-holders (in which term I include the committee), for not properly protecting the interests of the debenture-holders by registering their charge and otherwise, could not in the face of the evidence brought before me be supported. Even if registration had been effected, the charge could only, I think, have been utilized for the benefit of the debenture-holders with difficulty and after considerable time and expenditure, and the debenture-holders and their trustees might well shrink from the formidable undertaking of taking possession of and trying to manage or sell the millions of acres in *Lower California* included in the charge. Then, if I consider what chance the debenture-holders would have had at that time, if they had insisted on their rights, of recovering anything from the *American Company* or the *English Company*, I find that matters looked very bad for the debenture-holders. I see no good reason for differing from the view expressed by Sir *Edward*

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*Jenkinson* (an excellent witness), that, if the resolution had not been carried, the *English Company* would probably have had to go into liquidation, and the debenture-holders might have lost both their security and their money.

For these reasons, I have come to the conclusion that the Plaintiffs are bound by the resolution, and accordingly that their action must be dismissed, with costs.

Solicitors for the Plaintiffs: *Badham & Williams.*

Solicitors for the *English Company*: *Norton, Rose, Norton, & Co.*

Solicitors for the other Defendants: *Ashurst, Morris, Crisp & Co.*

F. E.

## THORNE *v.* HEARD.

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Jan. 12, 13, 24.

[1892 T. 1682.]

*Mortgage—Sale—Agent—Fraud—Concealed Fraud—Trustee—Trust Property—Cause of Action, Commencement of—"Still retained"—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Trustee Act*, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

In 1878 the Defendants, the first mortgagees of property, sold under their power of sale, and employed *S.*, a solicitor, to conduct the sale for them. *S.* received the sale moneys, and, after satisfying the Defendants' mortgage debt, retained the surplus sale moneys, falsely representing to the Defendants that he, *S.*, had the authority of the Plaintiff, the second mortgagee, to receive the same. *S.* applied the surplus to his own use, and until March, 1891, concealed his fraud by continuing to pay the Plaintiff interest on the second mortgage as though it were still existing. In February, 1892, *S.* became bankrupt, when the true facts were discovered; whereupon the Plaintiff brought an action against the Defendants for an account of the sale moneys, and payment of what was due to him on his second mortgage:—

*Held*, that the Plaintiff's claim was barred by the *Statute of Limitations* and sect. 8 of the *Trustee Act*, 1888, on the ground that his cause of action first accrued in 1878, when the Defendants committed an innocent breach of trust in allowing *S.* to receive the surplus sale moneys instead of handing them over to the Plaintiff, and not in 1892, when the Plaintiff discovered *S.'s* fraud; and that the Defendants were not liable under the exception in sect. 8 either as having been "party or privy" to the fraud of *S.*, or as having "still retained" the money sought to be recovered, the money not having been actually in their hands or under their control at the commencement of the action:

*Held*, also, following *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (1), that the fraud of *S.* could not be regarded as the fraud of the Defendants—that is, as a fraud committed by *S.* as agent for them or for their benefit, so as to render them responsible notwithstanding they were innocent of the fraud.

The *Trustee Act*, 1888, has in no way altered the principles which determine the time at which a cause of action for breach of trust or concealed fraud accrues.

The exception in s. 8 of the *Trustee Act*, 1888, as to property "still retained" by the trustee, applies and is confined to cases in which at the date of the writ the trustee still retains—that is, has actually in his hands or under his control—the trust property, or the proceeds thereof, sought to be recovered.

*Blair* v. *Bromley* (2) distinguished.

*Romer*, J., affirmed.

APPEAL of the Plaintiff from Mr. Justice *Romer* (3).

The further facts bearing upon the case will be found stated in the judgments of the Court of Appeal.

(1) 18 Q. B. D. 714. (2) 2 Ph. 354. (3) [1893] 3 Ch. 530.

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*Cozens-Hardy*, Q.C., *J. W. Clydesdale*, and *W. A. Peck*, for the Plaintiff, Appellant:—

*Searle's* fraud constituted a concealed fraud by an agent acting within the scope of his authority, and accordingly the Defendants are liable as his principals. The money is, in law, still in the Defendants' hands, they having wrongfully paid it to, or allowed it to be received by, their agent. Their authority to *Searle* as their agent was to pay the Plaintiff, as it was their duty to do; in such a case the *Statute of Limitations* is no bar to relief: *Gibbs* v. *Guild* (1); *Moore* v. *Knight* (2); *Blair* v. *Bromley* (3). Neither can the Defendants claim the protection of sect. 8 of the *Trustee Act*, 1888 (4), for they fall within the exceptions in sub-sect. 1, that the *Statute of Limitations* shall not apply in the case of "any fraud or fraudulent breach of trust to which the trustee was party or privy," or where trust property is "still retained by the trustee."

*Chadwyck Healey*, Q.C., and *Creed*, for the Respondents, the Defendants:—

The Plaintiff's cause of action arose in 1878, when *Searle* received and misappropriated the money; and accordingly the Plaintiff is now barred by the *Statute of Limitations* (21 Jac. 1, c. 16). The object of the exceptions in sect. 8 of the *Trustee Act*, 1888, is to prevent a trustee claiming the benefit of the *Statute of Limitations* so as to enable him to appropriate the trust fund to his own use. We certainly do not come within the first

(1) 9 Q. B. D. 59.
(2) [1891] 1 Ch. 547.
(3) 2 Ph. 354; 5 Hare, 542.
(4) Sect. 8 of the *Trustee Act*, 1888, so far as material, is as follows:—
"(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—
"(*a.*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him. . . ."

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exception, for we had no knowledge whatever of the fraud, and therefore could not be "party or privy" to it.

[*Cozens-Hardy*:—I quite admit that there was no moral fraud on the part of the Defendants.]

Then, have we "still retained" the trust property? We submit not. "Still retained" means "under the control" of the trustee at the date of the writ in the action. This is shewn by the use of the word "previously." Accordingly "retained" must mean, retained by the trustee personally, or under his personal control, at the time the action commences. Upon the facts here, it cannot be said that the money was retained by, or under the control of, the Defendants when this action was commenced.

Then, upon the question of agency, the facts shew that *Searle* treated himself, and was treated by the Defendants, as acting in a separate capacity and in no way as agent for them. But even if *Searle* was their agent, it must be shewn, in order to make them liable for his fraud, that the fraud was an act committed within the scope of his authority and for their benefit, not his: *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (1). In all the cases of concealed fraud, the fraud was concealed by the defendant. For instance, in *Gibbs* v. *Guild* (2) the defendant was implicated; and in *Blair* v. *Bromley* (3)—a partnership case—the fraud was concealed by the partner who committed it, the fraud being with reference to the partnership transactions. Here the fraud was purely personal to the party who committed it.

*Cozens-Hardy*, in reply:—

The construction put by the other side upon the expression "still retained" in sect. 8 of the *Trustee Act*, 1888, would render the Act mischievous. The argument is that money is not "retained" by the trustee unless it is either in his pocket or where he can immediately get it. I submit that is not the proper construction. Here the money came to the Defendants as money. The question is, Have they got rid of it in law? Money

(1) 18 Q. B. D. 714. (2) 9 Q. B. D. 59.
(3) 2 Ph. 354; 5 Hare, 542.

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which has been received by a trustee is "retained" by him until he does some conscious act to terminate his original position by parting with the money and paying it to some one else.

[A. L. SMITH, L.J.:—Suppose the money was stolen from the trustee before the writ?]

It would still be "retained." If the money was at the trustee's bankers and they failed even the day before the writ, still it would be "retained" by the trustee. Here the money was, in substance, received by the Defendants, and nothing was consciously done by them to part with that possession.

[LINDLEY, L.J.:—But the money was received by *Searle*, not by the Defendants. A man cannot be said to "retain" that which he has not got and cannot get.

KAY, L.J.:—Mr. *Chadwyck Healey* says with great force that the exceptions in this section are intended to prevent a trustee keeping trust property as his own.]

The words "in the control of" are not the words of the Act, and the word "retained" should not be so restricted.

[KAY, L.J.:—When do you say your right of action arose?]

Not until we discovered the fraud, and the statute would not begin to run till then: *Blair* v. *Bromley* (1). *Searle* was the Defendants' agent for the payment of the money to the Plaintiff. If the fraud of an agent arises out of an act within the scope of his authority, it is a fallacy to say that, in order to render the principal liable, it must be shewn that the fraud must be for the benefit of the principal. To render the Defendants liable, it is not necessary that they should have been "party or privy" to the fraud; it is sufficient that the fraud was committed by their agent.

1894. Jan. 24. LINDLEY, L.J. (after shortly stating the facts as they appear in the former report, and observing that the statements in the second receipt that the £333 had been paid to *Thorne*, and that the sale had taken place with his approval, were utterly untrue, continued):—

The liability of the Defendants is clear, unless they are

(1) 2 Ph. 354; 5 Hare, 542.

protected by sect. 8 of the *Trustee Act*, 1888, which makes the *Statute of Limitations* applicable to trustees in certain cases. The section was evidently intended to give considerable protection to honest trustees who have incurred personal liability by committing some breach of trust. The section enacts as follows:—[His Lordship read sub-sect. 1 (*a*), and continued:—]

Upon this enactment and the facts of this case two questions arise, viz., (1.) When did the Plaintiff's right of action accrue? (2.) If it accrued more than six years before the commencement of the action, does the case come within one of the exceptions to which the *Statute of Limitations* is made inapplicable?

First, as to the time when the cause of action accrued to the Plaintiff. The Defendants, as first mortgagees, sold in January, 1878. *Searle*, as their solicitor, received the purchase-money, and paid them, and undertook to pay the Plaintiff out of the balance. There was no fraud, and consequently no concealed fraud, in this transaction. The Plaintiff's right to be paid by the Defendants accrued as soon as they received the purchase-money from the purchaser; and the receipt of that money by *Searle* was clearly a receipt by the Defendants, he being their agent, to receive it for them. The fraud which was concealed occurred after this transaction, and after the right sought to be enforced in this action accrued to the Plaintiff. The fraud was the misappropriation by *Searle* of the Plaintiff's money to his own use, and the concealment of that fraud was effected by the continued payment of interest to the Plaintiff by *Searle*, purporting to act on behalf of the mortgagor, whose solicitor he also was.

The fraud thus perpetrated and concealed by *Searle* cannot, in my opinion, be treated as perpetrated or concealed by the Defendants. They, in fact, knew nothing of it; and in perpetrating and in concealing the fraud *Searle* was not acting, or even purporting to act, for the Defendants. He was acting fraudulently in his own interest, pretending to the Defendants that he had authority from *Thorne* to receive the amount due to him, and undertaking to remit it to him; and pretending to *Thorne* that his security was still subsisting, and paying interest to him accordingly. Consistently with *British Mutual Banking Company*

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v. *Charnwood Forest Railway Company* (1), these frauds of *Searle* cannot be regarded as the frauds of the Defendants—that is, as frauds committed by their agent for them, or for their benefit, and for which they are legally responsible although completely innocent of all fraud themselves.

The case of *Blair* v. *Bromley* (2), which was relied upon as shewing that in equity the cause of action ought to be regarded as accruing when the fraud was discovered, and not before, is clearly distinguishable on this ground. The fraudulent transaction was itself the cause of action, and the innocent partner was liable for that fraud; and it was concealed by the fraudulent partner, both when the fraud was committed and afterwards whilst he was a member of the firm, as well as after he had retired from it. *Moore* v. *Knight* (3) was a similar case. In both cases the fraud and its concealment in the first instance were, though committed by one partner, imputable to the firm; and, under those circumstances, the cause of action was held not to accrue until the fraud was discovered.

The law applicable to the *Statute of Limitations* in cases of concealed fraud was carefully examined by this Court in *Willis* v. *Earl Howe* (4), which was an action for the recovery of land, and the right of the plaintiff turned on 3 & 4 Will. 4, c. 27, s. 26. The point whether sect. 26 applies only to frauds committed by the defendant or those through whom he claims, or whether it extends to frauds committed by strangers, will be found alluded to by Lord Justice *Kay* (5), and he, following Vice-Chancellor *Kindersley* in *Petre* v. *Petre* (6), expressed his opinion that the fraud, to avail the plaintiff, must have been committed by the defendant or some person through whom he claimed. This accords with Lord *Redesdale's* opinion in *Hovenden* v. *Lord Annesley* (7). He puts the doctrine of concealed fraud thus: He says that the defendant's conscience is so affected that he ought not to be allowed to avail himself of the statute or lapse of time. *Willis* v. *Earl Howe*, moreover, decided that a fraud committed

(1) 18 Q. B. D. 714.
(2) 2 Ph. 354.
(3) [1891] 1 Ch. 547.
(4) [1893] 2 Ch. 545.
(5) Ibid. 552.
(6) 1 Drew. 397.
(7) 2 Sch. & Lef. 634.

and concealed, even by the defendant or one of his predecessors in title, would not avail the plaintiff if the fraud and its concealment were subsequent to the wrongful entry which gave the plaintiff or his predecessors a right to bring ejectment. This last point had in fact been already decided by the House of Lords in *Lawrance* v. *Lord Norreys* (1). No question of agency arose in *Willis* v. *Earl Howe* (2); but that case has a very important bearing on the present; for the statutory enactment on which the case turned is a legislative recognition and expression of previously well-settled principles in equity, and those principles were and are applicable to all kinds of property, and not to real property only.

Although, however, the equitable doctrine respecting concealed fraud is based on the moral injustice of allowing a man to take advantage of his own fraud and concealment, I am of opinion that, if the Defendants were liable for *Searle's* fraud and concealment, the cause of action against the Defendants would not have accrued to the Plaintiff until its discovery by him, or at all events until he might have discovered it with reasonable diligence.

The *Trustee Act*, 1888, s. 8, has in no way altered the principles which determine the time when a cause of action accrues: see *Moore* v. *Knight* (3). In the case of a breach of trust, a cause of action founded upon it accrues to the *cestui que trust* upon the commission of the breach of trust: *In re Swain* (4); unless that breach of trust is a fraudulent breach of trust, and is concealed by the trustee committing it, or by some person for whom he is legally responsible. In this case the Plaintiff's cause of action against the Defendants was a breach of trust committed by them, but not a fraudulent breach of trust; the fraud and its concealment were subsequent to the breach of trust, and were both attributable to *Searle*, who committed the fraud and concealed it, not for the Defendants, nor even ostensibly for them, but really for himself, and pretending to act, first, for the Plaintiff, and afterwards for the mortgagor.

I come, therefore, to the conclusion that the Plaintiff's cause

(1) 15 App. Cas. 210, 213.
(2) [1893] 2 Ch. 545.
(3) [1891] 1 Ch. 547.
(4) [1891] 3 Ch. 233.

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of action against the Defendants accrued in January, 1878, *i.e.*, more than six years before the commencement of the action, and that the *Statute of Limitations* protects the Defendants, unless the case falls within one or other of the exceptions mentioned in sect. 8 of the *Trustee Act*, 1888.

I pass, therefore, to the second of the questions before stated. Sect. 8 contains three exceptions—viz. (1.), frauds to which the trustee has been party or privy; (2.) cases in which trust property is still retained by the trustee; and (3.) cases in which a trustee has converted trust property to his own use. The third exception need not be further alluded to in the present case.

Counsel for the Appellant contended that the facts of this case brought it within the first exception; but I am clearly of opinion that they do not. It is only by a misuse of language that a person who in fact knows absolutely nothing of the fraudulent conduct of another, and who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is, liable in law for frauds which he has not committed; but to say that he is party or privy to them is quite another matter, and is only true when he has personally in some way participated in them. The Defendants were, in my judgment, in no sense whatever either fraudulent themselves or parties or privies to the fraud of *Searle*.

It was next urged that the case fell within the second exception, and that the Defendants still retained the Plaintiff's money. This, however, again is, in my opinion, not true in fact. The word "still" refers to the commencement of the action, and the use of the word is important. A trustee may be liable to make good trust money, with interest, as if it were still in his hands, and yet he may not in fact have it. But, in construing this statute, we have to ascertain whether in fact the trust property sought to be recovered is "still retained" by the trustee. That question ought to be answered in the affirmative if he, or any agent for him, has it so that he can get it; but in the negative if it has been lost, whether by his negligence or otherwise. The second exception applies to, and is confined to, cases in which at the date of the writ the trustee still retains—that is, has in his hands or under his control—the trust property, or the proceeds

thereof, sought to be recovered. The second exception assumes that the property sought to be recovered exists, and can be recovered. But, at the date of the writ in this action, the Defendants had not in fact got the money sought to be recovered, nor had they it under their control. They had, in fact, lent it and lost it. But for the statute, they would be liable for it, with interest; but the statute protects them, for in no proper sense of the expression can they be said still to retain the money.

The appeal must, therefore, be dismissed with costs.

KAY, L.J.:—

In 1878 the first mortgagees of certain real property sold it for £1700. £1000 of this went to pay off their mortgage, and there remained a surplus of £700. The Plaintiff was second mortgagee of the same property for £300. He now sues the first mortgagees for this balance. Undoubtedly the first mortgagees became trustees of the surplus proceeds: *Matthison* v. *Clarke* (1); *Charles* v. *Jones* (2); *Magnus* v. *Queensland National Bank* (3). They have not paid the Plaintiff any part of it, and *primâ facie* they are liable. But they claim the benefit of the *Statute of Limitations* contained in sect. 8 of the *Trustee Act*, 1888: and if they have not been party or privy to any fraud or fraudulent breach of trust, or have not retained the trust fund, or have not converted it to their own use, they may succeed in this defence, provided that six years have elapsed since the cause of action accrued.

The circumstances are very peculiar. At the time of the sale the Defendants were the first mortgagees, the Plaintiff was the second, and *Searle*, a solicitor, was the third. Previously to the sale *Searle* had been accustomed to pay interest on the mortgages as solicitor for the mortgagor. *Searle* acted in the sale as solicitor for the vendors, the first mortgagees. By their authority he received the whole of the purchase-money. He paid to them £1000 in discharge of the first mortgage. He retained the £700 surplus proceeds. He gave to the first mortgagees two receipts, one for £333 on account of "principal money due to"

(1) 3 Drew. 3; 3 W. R. 2; 4 W. R. 30. (2) 35 Ch. D. 544.
(3) 36 Ch. D. 25; 37 Ch. D. 466.

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the Plaintiff on his mortgage; and by the same document *Searle* undertook to deliver the mortgage deeds of the Plaintiff to the first mortgagees within fourteen days from the 5th of February, 1878, the date of the receipt. The other receipt was for the balance of the purchase-money, and was dated the same day; and with it *Searle* gave a separate undertaking to hand over his own mortgage deed to the first mortgagees.

If these receipts and undertakings had been brought to the knowledge of the Defendants, it might be argued that the nature of *Searle's* possession of the surplus proceeds was changed as between him and the first mortgagees. But their attention was not called to them; and, although *Searle* handed them, with other papers, to the first mortgagees, they were entirely ignorant of the contents of them. In fact, they left the surplus proceeds of the sale of the property in *Searle's* hands without any direction as to their application, and without any inquiry as to what he did with the money. *Searle* kept the money in his own possession, applied it to his own use, and became bankrupt in 1892.

The Plaintiff, the second mortgagee, first discovered these facts after *Searle's* bankruptcy; and on the 30th of August, 1892, he brought this action against the first mortgagees.

On the 3rd of January, 1878, *Searle* had written to the Plaintiff informing him that the mortgaged property was under contract for sale, and saying that the solicitors to whom the abstract was sent required to see the Plaintiff's mortgage. The Plaintiff thereupon sent the mortgage to *Searle*, who returned it in January, 1879. Except this intimation, the Plaintiff knew nothing of the sale, and was never informed that a sale had been carried out.

Of course the Defendants are liable unless the statute to which I have referred protects them. It has been argued that they were party or privy to *Searle's* fraud. Even if it could be said that they were liable for his fraud, it is another thing to say that they were party or privy to it. I think that those words in the statute indicate moral complicity, which is not suggested in this case. Then the Defendants certainly did not convert the money to their own use. Therefore, neither of those exceptions can apply. Did they retain the money? That is more doubtful.

*Searle's* receipt of the money as their agent and by their direction was equivalent to a receipt by the Defendants. It absolved the purchaser, and neither against him nor against the persons entitled to the surplus could they be treated as not having received it. Then, while the money remained in *Searle's* hands without any change in the nature of his possession of it, I should think that his retention of it was a retention by the first mortgagees.

Mr. *Chadwyck Healey* argued, and I am inclined to accept his argument, that the intention of the exception in the statute was to prevent a trustee using the bar by lapse of time to enable himself to appropriate a trust fund which he had not appropriated but had the power of appropriating. Money in the hands of an agent, from whom it could be recovered by the trustees, would be in this position; and it could not be the intention of the statute that the trustee might bar the *cestui que trust* and then recover the money from his own agent and keep it. For example, if the trustee had paid the money to his own separate account at a bank, not mixing it with his own money, so long as he could recover it from the banker I should think he retained it within the meaning of this exception in the Act. Up to the moment of *Searle's* bankruptcy the first mortgagees might have recovered the money from him; and until then I think the exception applied as to the whole. I am inclined to think that any dividend which they can obtain in the bankruptcy would be in the same position. But it is not necessary to decide this, because we are informed that the estate will pay no dividend. I am, therefore, compelled to conclude that, after *Searle's* bankruptcy and at the date of the writ in this action, the Defendants did not "still" retain these moneys.

Thus far I have been treating the case as though the six years began to run from the time when *Searle* received the money. It would, if the Plaintiff had been aware of such receipt. It was the duty both of *Searle* and the Defendants to inform the Plaintiff of this; and it was certainly a fraudulent act on *Searle's* part to omit to do so and to apply the money to his own purposes. The time would only begin to run against *Searle* from the discovery of his fraud in 1892. This was always the rule in equity,

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and since the *Judicature Act* it is the rule in all branches of the High Court: *Judicature Act*, 1873, s. 23; s. 24, sub-s. 1; *Gibbs* v. *Guild* (1).

It is argued that the Defendants are liable for the fraud of their agent which their breach of trust by leaving the money in his hands enabled him to commit, and that, therefore, time did not begin to run in their favour until the Plaintiff discovered this fraud. For this proposition the authority of *Blair* v. *Bromley* (2) was cited. In that case a retired partner in a firm of solicitors was held liable for the fraudulent representation of his co-partner, *William Bromley*, that a fund intrusted to the firm for investment on mortgage had been so invested. In fact it was not, but the money was used by the firm, though without the knowledge of the partner who was sued. Lord Chancellor *Cottenham* held (3) that the liability which arose from the representation was "merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true," and that the fraudulent partner might bind his co-partner "by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one." His Lordship continued thus: "I am, therefore, of opinion that *William Bromley's* partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud." That is, that, although the retired partner was not an accomplice in the fraud, and, indeed, had no knowledge or means of knowledge of it, and, therefore, of course, did not conceal the fraud in any sense, he could not avail himself of any lapse of time before the discovery of the fraud by the person injured by it. In *Moore* v. *Knight* (4) it was held by Mr. Justice *Stirling* that this decision was not affected by the statute we are now considering.

It seems to follow that, when a principal is liable for the fraud of his agent, time does not begin to run so as to bar the remedy

(1) 9 Q. B. D. 59.
(2) 2 Ph. 354.
(3) 2 Ph. 360.
(4) [1891] 1 Ch. 547.

against him until the injured person has discovered the fraud; and, to invoke this doctrine, it is not necessary to prove concealment of the fraud by the principal.

Now, in *Blair* v. *Bromley* (1) the retired partner had the benefit of the fraud. Is the principal liable for the fraud of an agent from which he obtains no benefit, but which was committed solely to benefit the agent? In *St. Aubyn* v. *Smart* (2) receipt of money by one of several partners with the knowledge of the others was held sufficient to make them all liable, although the firm did not benefit; the partner who received the money having paid it to his private account, from which he drew it out and absconded. Lord Justice *Page Wood* said (3): "It is a fraud of one partner, for which the other is liable." But in the earlier part of his judgment the Lord Justice treats the money as having been received by the firm and by them paid to the private account of the partner who misappropriated it.

In *Barwick* v. *English Joint Stock Bank* (4) Mr. Justice *Willes* stated the general rule to be "that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." This passage was cited with approval by Lord *Selborne* in *Houldsworth* v. *City of Glasgow Bank* (5); and it was deliberately decided in *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (6) that the words "for the master's benefit" in that statement of the doctrine are essential, and that where an agent in the course of his employment committed a fraud, not for his principal's benefit, but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it.

On the whole, I come reluctantly to the conclusion that the cause of action did accrue when *Searle* first received the money, and that the 8th section of the *Trustee Act*, 1888, bars the remedy against the Defendants.

The case seems a very hard one; the Plaintiff has been deprived

(1) 2 Ph. 354.
(2) Law Rep. 3 Ch. 646.
(3) Ibid. 650.
(4) Law Rep. 2 Ex. 259, 265.
(5) 5 App. Cas. 317, 326.
(6) 18 Q. B. D. 714.

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of his property by a breach of trust of which he knew nothing, and without any fault or negligence of his own. But the proximate cause of his loss is the fraud and bankruptcy of *Searle*, to whom the statute would give no protection. By that fraud the Defendants have not benefited, and I think they cannot be made liable for it.

A. L. SMITH, L.J.:—

This action is brought by the Plaintiff to have an account taken of certain moneys which in the year 1878 came into the Defendants' possession as trustees for the Plaintiff; the real question being whether the Defendants can avail themselves of the provisions of sect. 8 of the *Trustee Act* of 1888 (51 & 52 Vict. c. 59), and set up against the Plaintiff's claim that his cause of action did not accrue within six years before action brought.

On the 5th of February, 1878, the Defendants, who were trustees and first mortgagees of certain premises at *Torquay* to secure £1000, sold them under their power of sale, and realized thereby the sum of £1700.

The Plaintiff was second mortgagee of the premises to secure the amount of £333, and a solicitor named *Searle*, who was then a well-known local practitioner and trusted by all parties, had a third charge upon the property.

Upon the sale being effected the proceeds, viz., the £1700, were, with the Defendants' assent, received by *Searle*. He handed £1000 of this over to the Defendants to satisfy their mortgage debt, and gave the receipts, which have already been referred to by the Lords Justices who have preceded me, and which are set out in the report of the case in the Court below (1).

The Defendants at the time did not read these documents; they placed them with their trust papers, believing that everything would be in order and honestly and efficiently carried out by *Searle*.

It now appears that *Searle*, instead of handing over to the Plaintiff the sum of £333 due to him as he undertook to do, misappropriated it to his own use, and kept the fact of the sale concealed from the Plaintiff; and, in order to effect this, he paid

(1) [1893] 3 Ch. 531, 532.

and continued to pay the Plaintiff interest upon the £333 down to the year 1892, upon the footing that his second mortgage was still extant. In February of that year *Searle* became bankrupt; his defalcations were then discovered, and the present action was commenced.

It is not disputed that, but for the 8th section of the *Trustee Act* of 1888, upon which the Defendants rely, in the circumstances of the case they would be liable to account to the Plaintiff. It will be seen that there are three exceptions to the privilege conferred by this section: First, if there has been a fraud or fraudulent breach of trust to which the trustee was party or privy; secondly, if the trust property or its proceeds is or are still retained by the trustee; and thirdly, if the trust property has been converted to the trustee's own use. In either of such cases the trustee is not to have the benefit of the section.

These exceptions are framed to meet the cases of trustees who have been either guilty of fraud, or who are holding, by themselves or their agent, or have converted to their own use, the trust property; in other words, who are themselves fraudulent, or are appropriating or have appropriated the trust property to themselves.

As to the first exception, it is clear to me that the Defendants have not been party or privy to the fraud of *Searle*. A man cannot be said to be party or privy to that in which he has taken no part and of which he knows nothing, and which has in fact been committed by another for his own benefit.

As to the second exception, the question is, Was the £333 still retained—mark the word "still"—that is (as I read it), at the time of action brought by the Defendants? In my judgment, a man cannot be said to retain that which in fact he has not got, and which he has no power of getting.

It is true that the Defendants, fourteen years before action brought, had in their possession the £333, for the receipt by their agent, *Searle*, was a receipt by them. It is also true, as argued by Mr. *Cozens-Hardy*, that they never consciously parted with the possession of these moneys which they then had, for they thought nothing more about them; but that is not decisive of this point. Suppose these moneys had, before action brought,

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been stolen from the Defendants, and the thief had remained unknown and the money unrecovered, can it be said that the trustees "still retained" them?

It seems to me that it is impossible to so hold, and that upon the facts of this case the Defendants did not retain these moneys, within the meaning of the section, when the action was brought.

There is no pretence for saying that at this time *Searle* was holding the moneys for the Defendants; they had been made away with by him without the Defendants' knowledge, and we are told that any dividend coming from his estate is not worth considering. In my judgment, the second exception does not apply to them.

It is conceded that they are not within the third exception. But it is argued for the Plaintiff that his cause of action only accrued to him upon discovery of *Searle's* fraud immediately before the issue of the writ in 1892, and that the Defendants cannot prove their defence that the Plaintiff's cause of action arose six years before suit. It appears to me that *primâ facie* the Plaintiff's cause of action against the Defendants arose in the year 1878, when the Defendants by their solicitor, *Searle*, received the £333, and which the Defendants then neglected to hand over to the Plaintiff.

It is, however, answered that, although this might be so but for *Searle's* fraud, yet his fraud intentionally concealed from the Plaintiff, and kept him in ignorance of, his rights; that *Searle's* fraud was the Defendants' fraud, and that time, therefore, did not begin to run against the Plaintiff until the time when he might first with reasonable diligence have discovered the fraud.

I agree that, if an action had been brought against *Searle* for an account, he could not set up the *Statute of Limitations*. It would, in such action, have been a good replication to a plea of the *Statute of Limitations*, that the Plaintiff did not discover, and had not reasonable means of discovering, the Defendants' fraud until within six years before action brought: the case of *Gibbs* v. *Guild* (1), affirmed on appeal (2), has held this to be so.

It will be noticed that *Searle's* fraud was wholly disconnected with the Defendants, and only came into existence after the

(1) 8 Q. B. D. 296. (2) 9 Q. B. D. 59.

Defendants had failed to hand over the moneys, as they should have done in 1878, to the Plaintiff, and therefore after the cause of action against them had accrued.

It has been held by this Court, and not I think for the first time, in the case of the *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (1), where the authorities are collected, that a principal cannot be sued for the fraudulent acts of his agent, even though the agent purported to act within the scope of his employment, if, when the agent committed the fraud, he did so, not in the interest of his principal, but in his own interests.

If the Plaintiff were attempting to sue the Defendants for damages occasioned to him by reason of the fraudulent acts of *Searle*, he could not, in my judgment, succeed; because a principal is not responsible for his agent's fraud which is perpetrated in his own interest.

Then, why are the Defendants not to be allowed to rely upon what the statute permits them to set up and rely on, if they have not been guilty of some fraud themselves, or of some fraud for which they are responsible? I can see no answer to this; and it appears to me that the Defendants are entitled to rely upon the statute, and that *Searle's* fraud does not incapacitate them from so doing.

But it was said that the case of *Blair* v. *Bromley* (2) decided the contrary, and that no cause of action arose until the fraud was discovered. In that case one partner in a firm of solicitors was sued for a fraudulent misrepresentation made by his partner in relation to a matter within the limits of the partnership business, and which continued by concealment after the dissolution of the firm. Lord *Cottenham* held that the fraudulent misrepresentation was the representation of the firm, and that the cause of action against the innocent partner did not therefore arise till the firm's fraud was discovered.

In the present case, as before pointed out, *Searle's* fraud was not the Defendants' fraud, and hence the distinction between the two cases.

Mr. Justice *Stirling*, in the case of *Moore* v. *Knight* (3), held

(1) 18 Q. B. D. 714. (2) 2 Ph. 354. (3) [1891] 1 Ch. 547.

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that the decision in *Blair* v. *Bromley* (1) was unaffected by the *Trustee Act*, 1888, s. 8, and pointed out how that case rested upon principles of law relating to misrepresentation and partnership.

It was not contended in this Court that the payment of the interest by *Searle* to the Plaintiff took the case out of the statute.

In my opinion, the judgment of Mr. Justice *Romer* must be upheld, and the appeal dismissed.

Solicitors for Appellant: *Mear & Fowler*, agents for *G. H. Thorne, Nottingham.*

Solicitors for Respondents: *Yarde & Loader*, agents for *Prickman & Risdon, Exeter.*

G. I. F. C.

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*Dec.* 13, 14.
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*Jan.* 31;
*Feb.* 1, 2

## *In re* LANDS ALLOTMENT COMPANY.

*Company—Directors—Liability—Ultrà vires—Investment of Money in Shares of another Company—Temporary Investment—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 1, 8.

Directors of a company are trustees as to moneys of the company which have come to their hands or are under their control within the meaning of the *Trustee Act*, 1888, s. 1, sub-s. 3, and therefore can, in the absence of fraud, take advantage of the *Statute of Limitations* in proceedings against them for misapplication of the funds of the company.

The directors of the *L. A. Company*, which had no power to invest its capital in the shares of other companies, in March, 1885, accepted fully paid-up shares in the *B. S. Company* to the amount of £35,000 in discharge of a debt. This was referred to in the balance-sheet of the *L. A. Company* as "Assets. By *B. S. Company*," and the entry was explained by the chairman at the general meeting in April, 1885, to mean that it represented the amount due from the *B. S. Company* for an estate purchased from the *L. A. Company*. The same item was repeated in successive balance-sheets till 1889. The investment was made without any fraudulent intent. The *L. A. Company* was wound up in 1893:—

*Held* (affirming the decision of *Wright*, J.), that, assuming that the directors had been guilty of a breach of trust in investing the money in shares of the *B. S. Company*, they were protected by the *Statute of Limitations*; and that there had been no such fraudulent concealment on

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(1) 2 Ph. 354.

their part, notwithstanding the false statement by the chairman at the meeting, to prevent time from running under the statute.

Whether the directors had not power to accept the shares of the *B. S. Company*, if they took them as a compromise for the debt, and not with the intention of retaining them as a permanent investment—*Quære.*

In July, 1889, the directors of the same company passed a resolution to invest a further sum of £5200 in more paid-up shares of the *B. S. Company*. Two directors, *B.* and *T.*, were not present at the meeting, but they were present at the next meeting, at which the minutes of the previous meeting were read and confirmed. *B.* was in the chair and signed the minutes. *B.* was also in the chair at the next general meeting of the company, and he then referred to the new investment, and, speaking on behalf of the directors, said: "We carefully considered the matter, and deemed it advisable to exercise our right of subscription, and have no reason to regret our decision":—

*Held* (reversing the decision of *Wright*, J.), that although the presence of *B.* and *T.* at the meeting at which the minutes of the previous meeting were confirmed was not sufficient in itself to make either of them liable for the *ultrà vires* investment, yet *B.* had by his action as chairman at that meeting, and by his statement at the general meeting, shewn that he took an active part in the investment, and must be held responsible for it.

THE *Lands Allotment Company, Limited*, was registered as a limited company on the 25th of November, 1867.

By the memorandum of association the objects of the company were stated to be the purchasing, acquiring, improving, dealing with, and disposing of lands of any tenure situate in *Great Britain* or elsewhere; the constructing and repairing buildings and erections thereon; the granting rights and easements over any land acquired by the company; the raising money by way of mortgage or charge of or upon any land or property which should have been purchased or acquired by the company, or of or upon any estate or interest therein, and the raising money upon debenture bonds, deposit notes, or other securities of the company; the lending money by way of mortgage or charge of or upon any land which should have been sold, demised, exchanged, or granted or agreed to be sold, demised, exchanged, or granted by the company, or of or upon any estate or interest therein, and the carrying on of business as land agents and negociations for the sale and purchase of land.

By the 99th article of the articles of association the directors were empowered "to employ and invest the capital paid up and other moneys received by the company whether upon deposit

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or otherwise in or upon such securities, real, personal or mixed, other than their own shares, as they might from time to time approve."

Early in 1885 a builder named *J. W. Hobbs* was indebted to the *Lands Allotment Company* to the value of £35,000. A joint stock company called the *Building Securities Company* was formed for the purpose of taking over his business and liabilities, and among other things they undertook the liability of paying the debt of £35,000 to the *Lands Allotment Company*. But the *Building Securities Company*, not having the money at their disposal, made an arrangement with the directors of the *Lands Allotment Company* that the last-mentioned company should take 7000 shares of £5 each in the *Building Securities Company* in full discharge of this liability. Accordingly, at a meeting of the board of directors of the *Lands Allotment Company*, held on the 2nd of March, 1885, at which the following directors were present, *S. R. Pattison*, Rev. *Dawson Burns*, *G. Dibley*, *M. Theobald*, and *G. E. Brock*, and also *H. G. Wright*, the solicitor of the company, a resolution was passed to apply for 7000 shares in the *Building Securities Company*, and to pay the same up in full. This resolution was confirmed at the next meeting of the board on the 9th of March, when the same directors were present, and also Mr. *Jabez S. Balfour*, the chairman of the company. The shares were in due course allotted and paid for by a cheque for £35,000, which was balanced by a cheque for the same amount drawn by the *Building Securities Company* in discharge of their liability to the *Lands Allotment Company*.

This transaction was referred to in the balance-sheet of the *Lands Allotment Company*, issued in March, 1885, as follows: "Assets. By *Building Securities Company*, £35,000." At the annual general meeting of the *Lands Allotment Company*, held on the 18th of April, 1885, at which Mr. *Jabez S. Balfour* presided, and at which the other above-mentioned directors were present, Mr. *Balfour* was questioned by Mr. *Wratten*, one of the shareholders, as to the meaning of this item, and he replied, according to the minutes of the shorthand writer, that it was an asset representing an amount to be paid by the *Building Securities Company* in respect of an "estate" which they had purchased

from the *Lands Allotment Company*, and that it was put down as an unpaid item in order that the shareholders might see what it was. There was, however, some doubt whether the word used by Mr. *Balfour* was "estate" or "asset." The same item appeared in the balance-sheet in the four following years.

At the general meeting on the 16th of April, 1887, *Dibley*, who was chairman, was asked by one of the shareholders for an explanation of the item in the balance-sheet, and he replied that the *Building Securities* investment was the same as it had been for the last two or three years; and that the *Building Securities Company* was a very good company indeed, and the directors considered it a very capital investment.

At the general meeting on the 16th of May, 1888, the item was again referred to as an investment which could be disposed of in due time.

At the general meeting on the 28th of November, 1888, *Dibley* was again in the chair, and he stated that the directors were perfectly satisfied with the investment in the shares of the *Building Securities Company*, and that the investment paid a very good rate of interest, and they thought it would be unwise at the present time to disturb it.

At the general meeting on the 15th of April, 1889, *Brock*, who was in the chair, referred to the investment in similar terms of approbation.

At a meeting of the directors on the 1st of July, 1889, at which *E. Barnard* and *J. W. Dresser* were present, but *Theobald* and *Brock* were both absent, it was resolved to apply for 1040 more paid-up £5 shares in the *Building Securities Company*, and the money was paid to that company by three bills, which were duly met by the *Lands Allotment Company*.

At a board meeting on the 9th of October, 1889, during the currency of the last of the bills, *Brock*, who had been chairman of the company since April, was present. The minutes of the yearly meeting, among other minutes, were read and confirmed, and were signed by *Brock* as chairman. *Theobald* was also present, and did not oppose the confirmation of the minutes.

At the general meeting on the 17th of April, 1890, *Brock* was in the chair. He then said: "With respect to this new

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investment. You will no doubt observe that we have increased our holding in the shares of the *Building Securities Company.* That company decided last year on making a further issue of capital, and they intimated to us, with other shareholders, that we were entitled to so many additional shares. We carefully considered the matter, and, having regard to the excellent return on our then holding, and our confidence in the management of the company, we deemed it advisable that we should exercise our right of subscription, and we have had no reason to regret this decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent."

The *Building Securities Company* was ordered to be wound up in 1892.

The *Lands Allotment Company* was ordered to be wound up on the 16th of January, 1893, and in August, 1893, the official liquidator took out a summons to make the directors *Pattison, Burns, Dibley, Brock,* and *Theobald* jointly and severally liable to make good to the assets of the company the sum of £35,000 improperly invested by them in the purchase of 7000 shares of the *Building Securities Company.*

He also took out another summons to declare *Barnard, Dresser, Brock,* and *Theobald,* jointly and severally liable for the sum of £5200 invested by them in 1040 other shares in the same company.

The summonses came on for hearing before Mr. Justice *Wright* on the 13th of December, 1893.

*Finlay,* Q.C., *E. S. Ford,* and *Muir Mackenzie,* in support of the summonses:—

As regards the first summons: The investment in shares was *ultrà vires.* Having regard to art. 99, it would have been an improper investment even without reference to the wording of the memorandum of association. But the case must be decided on the wording of the memorandum of association alone, without reference to the articles, and the investment was clearly not within the powers given by the memorandum. If the investment was *ultrà vires,* the Respondents are clearly liable. If it was *intrà vires,* they are liable because, under the circumstances, it

was an improper investment, and they have fallen short of the standard of care required from directors: *In re Oxford Benefit Building and Investment Society* (1); *Leeds Estate Building and Investment Company* v. *Shepherd* (2). The Respondents may contend that they are entitled to set up the defence of the *Statute of Limitations*; but this cannot be raised where what is complained of is a continuing act: *In re Swain* (3).

Moreover, directors, being in a fiduciary position as regards the company, or "*quasi* trustees," are not entitled to set up the defence of the statute: *Flitcroft's Case* (4); *In re Oxford Benefit Building and Investment Society* (5); *In re Faure Electric Accumulator Company* (6); *In re Sharpe* (7). Nor is the position of a director improved by the *Trustee Act*, 1888. He is not a trustee within the meaning of sect. 1, sub-sect. 3, of that Act—that is to say, "an executor or administrator," "a trustee whose trust arises by construction or implication of law," or "an express trustee": *Sovereign Life Assurance Company* v. *Wilmot* (8); *In re Bowden* (9).

And, even if a respondent was a trustee within the Act, he could not avail himself of its protective provisions, because sect. 8 expressly excepts the case in which "the claim is founded upon any fraud or fraudulent breach of trust."

[*Herbert Reed*, Q.C., for *Theobald*:—The question of fraud cannot be raised, as the summons does not specifically allege fraud: *Bentinck* v. *Fenn* (10); *In re New Mashonaland Exploration Company* (11).]

[They also referred to *Moore* v. *Knight* (12); *In re Page* (13); *In re Gurney* (14); *In re National Permanent Mutual Benefit Building Society* (15).]

As regards the second summons: All the Respondents are

(1) 35 Ch. D. 502.
(2) 36 Ch. D. 787, 805.
(3) [1891] 3 Ch. 233.
(4) 21 Ch. D. 519, 535.
(5) 35 Ch. D. 509.
(6) 40 Ch. D. 141, 150.
(7) [1892] 1 Ch. 154.
(8) 9 Times L. R. 525
(9) 45 Ch. D. 444.
(10) 12 App. Cas. 652.
(11) [1892] 3 Ch. 577.
(12) [1891] 1 Ch. 547.
(13) [1893] 1 Ch. 304
(14) Ibid. 590.
(15) 43 Ch. D. 431.

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liable. It is unnecessary to shew that each director was present at every meeting.

*Ingpen*, for *Burns*:—

The *Trustee Act*, 1888, affords this Respondent complete protection if he has been guilty of any misfeasance, for no fraud on his part is alleged. Before that Act the ground on which a director was held liable on a misfeasance summons was that he was a "constructive trustee," and the Act expressly applies to such a trustee.

There was no continuing breach of trust in this case.

*Farwell*, Q.C., and *Bramwell Davis*, for *Dresser*:—

No case of acting *ultrà vires* or fraudulently has been established. As regards the investment, it can be supported as an interim investment. It was not a speculative one. Under the circumstances, the directors, having exercised a discretion and acted honestly, are not liable, even although a mistake has been made: *London Financial Association* v. *Kelk* (1); *Lindley* on Companies (2).

*Woodfall*, for *Dibley*:—

Although the articles of association cannot extend the memorandum, they may be read to explain it. They may define the directors' powers as to the management of the company's affairs. If the investment had been a speculative one, there might be a liability attaching; but this is not so where what has been done is simply taking the best you can get to cover a bad debt: *Royal Bank of India's Case* (3).

[He also referred to *Parker* v. *Lewis* (4); *Harbor Bank* v. *Lewis Co. Bank* (5); *British and American Telegraph Company* v. *Albion Bank* (6).]

*Marshall Hall*, and *R. E. Moore*, for *Brock*:—

As regards the first summons, the purchase of shares was

(1) 26 Ch. D. 107.
(2) 5th Ed. p. 373.
(3) Law Rep. 4 Ch. 252.
(4) Law Rep. 8 Ch. 1035.
(5) 11 Barb. 213, cited in *Brice* on *Ultrà Vires*, 3rd Ed. p. 177.
(6) Law Rep. 7 Ex. 119.

within the wording of the memorandum of association, for it authorizes dealings in land, and land was the only commodity with which the *Building Securities Company* had anything to do.

*Brock* is under no liability in respect of the matter referred to in the second summons. He was present only at the confirming meeting, and before that was held everything had been arranged.

*Herbert Reed*, Q.C., and *C. E. E. Jenkins*, for *Theobald*:—

The Court has many times said that directors are not trustees, but agents to conduct the business of the company. If that is so, they are entitled to set up the *Statute of Limitations*; if not, they are entitled to the protection of the *Trustee Act*, 1888. At any rate, they are constructive trustees: *Charitable Corporation* v. *Sutton* (1).

As to the second summons, *Theobald* only attended the confirming meeting, and cannot be held liable for what had already been decided on.

*Houghton*, for *Pattison*, was not called on.

*Muir Mackenzie*, in reply:—

Before the *Trustee Act*, 1888, directors were held not to be trustees, but to stand in such a fiduciary position towards the company that they were liable as trustees. The Act only affords a director protection if he is actually a trustee, as the word is therein defined; and it is plain that a director does not come within the definition. But if the directors are trustees in the strictest sense, the case made out against them brings them within the exception in sect. 8 of the Act.

As regards the second summons, *Barnard* and *Dresser* are in the same position. *Brock* and *Theobald* cannot escape liability because they were not present at all the meetings: *Joint Stock Discount Company* v. *Brown* (2).

[They also referred to *Darby* and *Bosanquet* on the *Statutes of Limitations* (3).]

(1) 2 Atk. 400. (2) Law Rep. 8 Eq. 381.
(3) 2nd Ed. p. 556.

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WRIGHT, J.:—

As regards the first summons in this case, I am of opinion that it must be dismissed. The *Lands Allotment Company*, of which the Respondents were directors, had made advances to *J. W. Hobbs*, a builder, and in respect of these advances he owed them £35,000 or upwards. A new company, called the *Building Securities Company*, was then being formed for the very purpose of taking over the business of *J. W. Hobbs*; and as this company had undertaken to pay off *Hobbs's* liabilities, it would have had to pay the *Lands Allotment Company* this debt of £35,000. For the common convenience of both companies, or at any rate for the convenience of Mr. *Balfour*, and those in whose interests he acted, a proposal was made—it does not at all appear by whom—that in substance the *Building Securities Company* should hand ever 7000 of their £5 shares to the *Lands Allotment Company*, and that *Hobbs's* liability, which otherwise the *Building Securities Company* would have had to pay off to the *Lands Allotment Company*, should be treated as extinguished. There is no evidence that any of the gentlemen who are Respondents to this summons had any doubt that that was an excellent business arrangement. The *Building Securities Company* went on for a considerable time without getting into any difficulties, and there was nothing to shew that there was any reason to suppose that what had been done was in any way a waste of the assets of the *Lands Allotment Company*.

I am of opinion that it was entirely *ultrà vires* of the *Lands Allotment Company*, under their memorandum of association, to put any of their capital or any of their assets into the shares of a company trading for purposes entirely foreign to the purposes of that memorandum of association. In my opinion, there are no such words in the memorandum as could possibly be held to justify an investment in the shares of the *Building Securities Company*. "But it is merely a question of *ultrà vires*," then say the Respondents, "and we are saved by the *Statute of Limitations*. It is true that we were trustees, or we admit we were trustees, and should therefore be liable but for the *Trustee Act*, 1888; but we are saved by that Act." No decision on that point, as regards the directors of a company, has been cited to

me, though a case before Mr. Justice *Chitty* (*Sovereign Life Assurance Company* v. *Wilmot* (1)) has been referred to, in which it appears to me he did not decide the point at all; but it is a point of the greatest importance, which, no doubt, must be decided sooner or later, and I hope very soon by a higher tribunal than this. Without at all deciding that the *Trustee Act*, 1888, does not apply of its own force to directors of companies as directors, as to which there is a great deal of doubt, I incline to the opinion that it does not apply to them. The trustees mentioned in the Act of 1888 are persons who in the contemplation of Law are in reality trustees, and I think that of itself the Act would not apply to relieve directors of companies acting as such, as distinguished, of course, from cases in which they may be trustees of property or anything else for their company or for anybody else. But then, I think that, under sect. 165 of the *Companies Act*, 1862—for which sect. 10 of the *Companies* (*Winding-up*) *Act*, 1890, under which this summons has been issued, has been substituted—the Courts have always treated directors as being, although not trustees, very much in the position of, or for most purposes in the position of, trustees; and it is as being assimilated to trustees that they are sought to be held liable in this case. But if they had been trustees in the fullest sense, they would have been relieved by the Act of 1888; and since their liability is only because of, or depends upon, their being assimilated to trustees, it seems to me it would be wrong to hold them entitled to less protection than the protection to which real trustees would be entitled. It seems to be an *à fortiori* case. If they are treated as trustees merely on the ground that, although they are not trustees, they ought to be treated like them, it seems to follow that they ought to be entitled to at least the same protection, in the matter of limitation, as real trustees.

If that is the case, it rests upon the Applicant to shew that the directors are disentitled to claim the benefit of the *Statute of Limitations* on the ground of "fraud or fraudulent breach of trust to which the trustee was party or privy." Then, is there evidence on which I ought to act, that there has been fraud or fraudulent breach of trust to which the Respondents were parties

(1) 9 Times L. R. 525.

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or privy? I am not quite sure that that is exactly the question to be decided, because if I am right in saying that directors are within the protection of the Act, not because of the words of the Act, but because the Court assimilates them to trustees, it may well be that directors will be disentitled to protection by something short of what would disentitle a real trustee to the protection of the Act. I do not wish to decide any such question. But here only one charge of fraud is made—that is, a fraud of concealment, which is sought to be supported by evidence of what took place at a meeting in 1885. Apart from that, I am quite satisfied that there was neither fraud nor negligence on the part of any of these gentlemen, unless it were Mr. *Balfour*. I think they might perfectly well believe themselves justified in acting upon the articles of association; and on the articles of association, apart from the memorandum of association, I have no doubt that this investment would have been within the powers of the company: in which case there is no evidence to shew it was any such irrational thing for the directors to do so as to make them guilty of misfeasance.

[His Lordship concluded by dealing with the evidence, and, as regards that which related to the charge of concealment, held that it was too slender, when standing by itself, to be acted upon in a case of this kind.]

Then we come to the second summons. It seems to me that the further investment of the sum of £5200 in the additional shares was *ultrà vires*, and I cannot see any answer on behalf of Mr. *Dresser* or Mr. *Barnard* as regards that part of the case. As regards Mr. *Brock* and Mr. *Theobald*, there is no real evidence to shew that either of these gentlemen was party beforehand to the transaction being brought forward before the board. There is merely the statement by Mr. *Brock* on a subsequent occasion that the directors had all thought it an excellent investment; but neither *Brock* nor *Theobald* was present at the meeting at which the resolution was passed for taking up these further shares, and, although they did attend what is called the confirming meeting in October, it does not appear to me that that mere fact, by itself, makes any difference, because before the confirming meeting in October the whole thing had been carried

into execution. All the bills given for the shares had either been paid or put into currency, and all that was done at the so-called confirming meeting was that the usual resolutions were carried, and the minutes of the previous meeting were read and confirmed.

I think that all this is not enough to fix liability upon anybody. But inasmuch as Mr. *Theobald* and Mr. *Brock* ought to have considered this matter, and as it must be imputed to them that they must have known that the investments were improper ones, I cannot say that it was wrong to make the application against them. As against them, the summons will be dismissed without costs; as regards *Dresser* and *Barnard*, it will be allowed with costs.

F. E.

From the judgment on both summonses the Official Liquidator appealed. *Dresser* and *Barnard* did not appeal.

The appeal came on to be heard on the 31st of January, 1894.

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*Finlay*, Q.C., *E. S. Ford*, and *Muir Mackenzie*, for the Appellant:—

The investment of the capital of the *Lands Allotment Company* in the shares of another limited liability company was not sanctioned by the memorandum of association or the articles of association. It was not merely a temporary investment of shares taken in satisfaction of a debt, but a permanent investment of the assets of the company. It was, therefore, an *ultrà vires* act for which the directors who were present at the meetings when the investment of the £35,000 was made were liable. This applies to all the directors named in the first summons. Their only defence is the *Statute of Limitations*, and they claim the benefit of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59), s. 8, sub-s. 1 (*a*), which puts trustees, except in cases of fraud, or where they are in possession of trust property, on the same footing as persons who are not trustees. But the directors of a company are not trustees within the meaning of this clause. It is true that sect. 1 of the Act provides that, for the purpose of the Act, the expression "trustee" shall be deemed to include a trustee whose trust

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arises by construction or implication of law as well as an express trustee; but that does not include persons in the position of directors. They have been held in several cases to be persons in a fiduciary position; but they have never been held to be trustees either express or constructive. A trustee implies the possession of trust funds, which the directors have not; they have only the power of dealing with the funds of the company: *In re Faure Electric Accumulator Company* (1); *Flitcroft's Case* (2); *In re Sharpe* (3). But if the Court should be against us on the construction of the statute, there is another reason why the directors cannot take advantage of the *Statute of Limitations*, namely, that the investment in question was fraudulently concealed from the shareholders. In the first general meeting after the investment was made, the chairman stated that the sum of £35,000 which appeared in the balance-sheet as an asset of the company represented an amount which had been paid by the *Building Securities Company* in respect of an estate which they had purchased from the *Lands Allotment Company*. This was entirely false, and, though the entry appeared every year in the balance-sheet, it was never explained to the shareholders till the meeting in November, 1888, which is within the limit of six years. The balance-sheet was in fact delusive, and deceived the shareholders. The directors were all responsible for the concealment, and they cannot therefore rely upon the statute: *Moore* v. *Knight* (4).

[KAY, L.J., referred to *Willis* v. *Earl Howe* (5).]

With respect to the second appeal, which relates to the additional investment of £5200, both *Theobald* and *Brock* were present at the meeting of the directors in October, 1889, when the minutes of the meeting at which the investment was made were confirmed. They ought to have objected to it as *ultrà vires*, and had the resolution revoked. With respect to *Brock* the case goes further, for he was in the chair and signed the minutes; and also, at the subsequent general meeting on the 17th of April, 1890, he called attention to the additional investment, and said:

(1) 40 Ch. D. 141.
(2) 21 Ch. D. 519.
(3) [1892] 1 Ch. 154.
(4) [1891] 1 Ch. 547.
(5) [1893] 2 Ch. 545.

"We carefully considered the matter, and deemed it advisable that we should exercise our right of subscription" to the *Building Securities Company.* He thus admitted his concurrence in the investment, and his consequent liability: *Joint Stock Discount Company* v. *Brown* (1); *Ashhurst* v. *Mason* (2).

LINDLEY, L.J., said the Court did not desire to hear counsel for any of the Respondents except *Brock.*

*Swinfen Eady,* Q.C., *Woodfall,* and *G. E. Tyrrell,* appeared for *Dibley.*

*Houghton,* for *Pattison.*

*Ingpen,* for *Burns.*

*Herbert Reed,* Q.C., and *C. E. E. Jenkins,* for *Theobald.*

*Marshall Hall,* and *R. E. Moore,* for *Brock*:—

When *Brock* signed the minutes of the previous meeting of July, 1889, it was too late to object to the investment. The minutes were only confirmed as to their accuracy. A director is not bound to proceed against his brother directors to revoke *ultrà vires* acts which they have committed. With respect to his speech at the general meeting, when he said "we" he did not speak for himself personally, but as the mouthpiece of the board, as the editor of a newspaper speaks on behalf of the proprietors.

LINDLEY, L.J.:—

This is an application under sect. 10 of the *Companies (Winding-up) Act,* 1890, which has replaced a previous section of the Act of 1862.

Two summonses have been taken out against former directors of this *Lands Allotment Company* which is now being wound up. The object of the first summons is to compel certain gentlemen to refund or make good the sum of £35,000, and the object of the second is to compel two of them, viz., Mr. *Brock* and Mr. *Theobald,* to make good a sum of £5200.

(1) Law Rep. 8 Eq. 381. (2) Law Rep. 20 Eq. 225.

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As to the £35,000, the case stands in this way. It appears that a builder named *Hobbs* was indebted to this company to the extent of £35,000, and that a company, called the *Building Securities Company*, was formed to purchase *Hobbs'* business, to take over his assets and his liabilities. Under the arrangements made in the formation, or after the formation, of the *Building Securities Company*, it became their duty, as between them and *Hobbs*, to pay off that sum of £35,000 which he owed to the *Lands Allotment Company*, and they proceeded to do that in this way. They had not, as I infer from the form taken by the transaction, £35,000 to pay off *Hobbs'* debt with, and so they said to the *Lands Allotment Company*, "If you will buy our shares to the amount of £35,000 and send us a cheque for that sum, you shall have the cheque back, and so we will repay you *Hobbs'* debt." And that farce was gone through.

Now, what is the effect of that? In point of fact, no money passed out of the coffers of the *Lands Allotment Company* into the coffers of the *Building Securities Company*. It was a mere paper transaction so far as cash was concerned. It is very true cheques were handed into the bank one day and taken out the next; but the real substance of that transaction, when you see through the cloak which is thrown around it, is that the *Lands Allotment Company* took £35,000 worth of shares in the *Building Securities Company* in satisfaction of *Hobbs'* debt. That was what was really done.

Now it is said that that is a transaction which is *ultrà vires* of the directors of the *Lands Allotment Company*. I doubt, if you look at it as I am disposed to do as a matter of substance, whether it is. I have not the slightest intention of throwing any doubt whatever upon its being *ultrà vires* if the effect of it was to invest money for the *Lands Allotment Company* in the purchase of shares in the *Building Securities Company*. I have not the slightest doubt that that would be *ultrà vires*, notwithstanding the ingenious argument we have heard upon the memorandum of association of the *Lands Allotment Company*. But, in substance, I doubt whether it was not within the powers of the directors to take fully paid-up shares of any company in satisfaction of a debt which they could not get paid. At all events, I shall pass

that over, and for the rest of my observations I shall assume that the learned Judge was right in holding it to be an *ultrà vires* transaction. Then, if it was an improper transaction, all those directors who were parties to this improper investment, for in this point of view it was improper, would naturally and obviously be liable to make good the money. All that is conceded if the assumption is granted. Then comes the question whether they are protected by the *Statute of Limitations* which is applicable to trustees, and the learned Judge has held that they are, and, I confess, it appears to me that he is obviously right in the construction which he puts upon that statute. Just consider what we are asked to do here. We are really asked to put ourselves in a most grotesque position. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of the *Statute of Limitations* which was passed for the benefit of trustees. I cannot be party to any decision so supremely absurd. Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old *Statute of Limitations* because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees. Then, when the Legislature passed an Act of Parliament—the *Trustee Act*, 1888 (51 & 52 Vict. c. 59)—protecting trustees against actions for breaches of trust, how can it be with any reason said that directors are not to have the benefit of this statute? I cannot go that length. I am satisfied that the statute does apply. Let us look at the words of it. The first section of the Act with which we are dealing says this: "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds." I rather think when you

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look at the case of *Soar* v. *Ashwell* (1), in which Lord Justice *Bowen* took so much pains to classify trustees and to distinguish constructive trustees from express trustees, you will find that directors are considered as express trustees of money which they have control of. But, if not, certainly they come within the other part of the definition of "construction or implication of law." It is precisely because they are one or the other that they always have been held liable and have always been denied the benefit of the old *Statute of Limitations*. That being the case, I have no hesitation in saying that these gentlemen are entitled to the benefit of the statute. The statute applies to them, and applies to all directors who have in their hands or under their control moneys of a company and who by mistake or carelessness misapply it. There are words in sect. 8 which render this statute inapplicable to cases of misappropriation of money to the use of the persons misapplying it and to cases of fraud. But no charge of such misappropriation or of fraud is brought against the directors in the present case.

But although, so far, I have no doubt whatever that this statute is applicable, another point is raised which is important. It is said that this was one of those cases of concealed fraud in which the cause of action did not accrue until the fraud was discovered. Now the misapplication in this case was not fraudulent in any sense. I am quite satisfied from the affidavits of the directors that they thought they were doing what was right and beneficial to the company. They made a mistake in their powers, assuming as I do now that this was an *ultrà vires* transaction. But the case of concealed fraud is attempted to be made out in this way—that, at a meeting when this matter was referred to, the £35,000 was entered in the first balance-sheet, and subsequent balance-sheets, as an asset under the words which I will read. It is on the credit side. "Assets. By *Building Securities Company*, £35,000." Now that by itself, to my mind, may mean anything. It is clear that it means an asset. But it may mean land owned by the *Building Securities Company*; it may mean that it is an investment in that company. That entry in the balance-sheet is quite consistent with either view.

(1) [1893] 2 Q. B. 390, 395.

But we have it proved, subject to a remark which I will make presently, that shortly after this transaction, viz., on the 18th of April, 1885, and after the balance-sheet to which I referred had been circulated among the shareholders, Mr. *Balfour* made a speech or answered a question put to him by one of the shareholders. The shareholder asked the chairman, Mr. *Balfour*, "I see an item of £35,000 *Building Securities Company* in the assets. Is there any reason why we should not know what those securities are?" Then Mr. *Balfour* says this, in answer to that question, "It will be probably best to answer the question of Mr. *Wratten* right away. There is no reason for anybody not having any information they want. Everybody apparently but Mr. *Wratten* knows that the '£35,000. By *Building Securities Company*' is an asset representing an amount which is to be paid by the *Building Securities Company* in respect of an estate they have purchased from us."

Now, whether the real word used here was "estate," as the shorthand writer maintains, or was "asset," as is suggested in the statement by Mr. *Balfour*, the statement that £35,000 is an asset representing an amount which is to be paid by the *Building Securities Company* is untrue. No one could justify that in any sense: whether you treat the words as "an estate" or "an asset," the statement is untrue. The argument is then put in this way —that this untrue statement was made by Mr. *Balfour* at a meeting at which these other gentlemen who are sought to be charged with this sum were present, and that, unless they did not then and there get up and deny it and put it right, they are to be treated as parties to the untrue statement, and as concealing the transaction. I think it would be pressing that contention against them a great deal too far if we gave effect to it. In the first place, I can easily understand that they did not realize the effect of his statement about the money being paid at all; and the affidavits which they have filed, and to which I have referred, satisfy me that they thought it was a thing not to be concealed, but a thing rather to be proud of. They thought they had done an uncommonly good thing for this company in putting £35,000 into the shares of this building society. Why should they want to conceal it? Why Mr. *Balfour* should have

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gone out of his way to say what he did I do not know, and I think the evidence is far too weak to justify us in holding the other directors liable for these moneys on the ground that they were parties to a fraud in concealing what they had done. I am strengthened very much in that conclusion by expressions which were used at subsequent meetings, and to which I will refer. At the meeting of 1887, Mr. *Dibley* was then in the chair. He said: "The *Building Securities* investment is just the same as it has been for the last two or three years. The *Building Securities* is a very good company indeed, and we consider it is a very capital investment by the board." And later on, in 1888, it is quite obvious that everybody knew the exact nature of this investment—knew that it was an investment of money in shares of the *Building Securities Company*. Now, the only deduction which I can draw from these materials is, that it would not be right to saddle these gentlemen with a charge of fraud or concealment of fraud in respect of this transaction—I do not think that any jury would do that—and I acquit them of it altogether. Although, therefore, if the true view is that this was an *ultrà vires* transaction, the directors would be liable to replace the money, they are protected by the *Statute of Limitations* to which I have referred, and the appeal against the learned Judge's decision as regards them must be dismissed with costs as against all of them.

I now come to the second transaction, which is a different matter altogether. It appears that in July, 1889, a further sum of £5200 was invested. It really was this time invested in the purchase of shares of this *Building Securities Company*. There were 1040 shares of £5 each which were applied for and taken. They were not paid for in cash at the time. They were paid for by three bills at various dates. At the meeting of the 1st of July, 1889, neither Mr. *Brock* nor Mr. *Theobald*, who are sought to be made liable for this improper investment, were present. On the 9th of October, after two of the bills which had been given had become due and had been paid, and whilst the third bill was running, and before it became due, the minutes of the meeting of the 1st of July, 1889, were confirmed. At that confirmation meeting on the 9th of October, 1889, Mr.

*Theobald* and Mr. *Brock* were both present, and it is because Mr. *Theobald* was present at that meeting that it is sought to charge him with liabilities in respect of this sum. Now, it is quite certain upon the evidence that he had nothing to do with the transaction originally. He was away on the sea, and had nothing to do with this at all, and the case against him is simply that he was party to the confirmation, and it is put in this way—that he thereby adopted or ratified it, and that he, at all events, might have taken legal proceedings, or induced the company to take legal proceedings, to set aside the transaction. Now, I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction after the thing is done, and I do not think it would be in accordance with the principles applicable to these cases if we were now first to make a precedent of that kind. I am satisfied from Mr. *Theobald's* affidavit that he knew nothing at all about the matter, and when he did come back, and found out what was done, it was too late to stop it, the matter was over, and past praying for, so far as he was concerned. It appears to me, therefore, that Mr. Justice *Wright* was quite right in exonerating Mr. *Theobald* from all liability in respect of that sum.

As regards Mr. *Brock*, the case is a very different one indeed. Mr. *Brock*, although he was absent in July, 1889, had been a director of this company for some time, and had been chairman of the directors, and when he came back—which he did before the 9th of October, 1889—he, as an acting director and as chairman of directors, took the chair at the meeting, and he signed the resolutions confirming what had taken place. If the matter had stood there, I should have thought that he would have been in the same position as Mr. *Theobald*; but the case does not stop there, for on the 17th of April, 1890, there was a meeting at which Mr. *Brock* made this speech, as appears from the evidence which has been given. There is no reason for distrusting the evidence of the shorthand writer upon this point. Mr. *Brock* was in the chair at the annual general meeting of the 17th of April, 1890, and he says this: "You will no doubt observe that we have increased our holding in the shares of the

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*Building Securities Company.*" This is true: they had increased it by £5200. "That company decided last year on making a further issue of capital, and they intimated to us, with other shareholders, that we were entitled to so many additional shares. We carefully considered the matter, and having regard to the excellent return on our then holding, and our confidence in the management of the company, we deemed it advisable that we should exercise our right of subscription, and we have had no reason to regret this decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent." Now, it is impossible, I think, after that to say that Mr. *Brock* knew no more about it than Mr. *Theobald.* I cannot construe that speech, even making all allowance for the use of the word "we," as amounting to anything else than this: a statement by Mr. *Brock* that "we," including the directors and including himself, "carefully considered" this application before they made up their minds to accept that offer. He was chairman from April, and his chairmanship covered the whole period of the negotiations which led to this, and he says: "We carefully considered the matter, and we deemed it advisable that we should exercise our right of subscription." I have come to the conclusion from his own statement, that Mr. *Brock* was so mixed up in this, and took so active a part in it, that he is liable; and I think his view was, until the matter got into liquidation, that it was a judicious thing to do. He not only approved of it, but he thought it was an uncommonly good thing for the shareholders, and he claims credit to himself for his intelligence in seeing, as he thought, that it was an uncommonly good thing. I take him as doing exactly what he says he did—exercising his judgment upon it, believing perfectly honestly it was *intrà vires*, but making a mistake as to the powers of directors in investing money. As regards him, therefore, it appears to me that the appeal must succeed, and he must be held liable for this £5200, together with the other two directors who have not appealed.

KAY, L.J.:—

The transaction as to the £35,000 seems to have been of this kind. This *Allotment Company* had been formed, and *Hobbs*, the

builder, was indebted to them in a sum of £35,000. Then shortly afterwards the *Building Securities Company* was formed, and we are told it was formed for the purpose, amongst other things, of taking over the building business of Mr. *Hobbs*. Then the parties were in this position. The *Building Securities Company* were going to buy *Hobbs*' business, and, of course, they would owe to *Hobbs* a large sum for the purchase of that business. What the amount was we are not told. *Hobbs* was indebted in £35,000 to the *Lands Allotment Company*, and an arrangement was made between *Hobbs* and the *Lands Allotment Company* and the *Building Securities Company* by which the *Building Securities Company* were to pay *Hobbs*' debt upon condition that the £35,000 should be invested in shares of the *Building Securities Company*. In point of fact, it was a kind of compromise of the indebtedness of *Hobbs* to the *Lands Allotment Company*. I do not know, of course, what all the circumstances were, but it is quite possible it may have been the very best way of getting *Hobbs*' debt paid, because it seems that these *Building Securities Company* shares were very valuable at that time and for some time afterwards, and for some years paid a very large dividend. I will not pause to consider whether that was *intrà vires* of the *Lands Allotment Company* or *ultrà vires*, but it would require a great deal of argument to convince me that the directors of a company like the *Lands Allotment Company* might not make a compromise of that kind if it was a compromise with a person largely indebted to their company. I conceive that the directors of every company being the managing agents of a trading concern have considerable authority and power in dealing with outstanding debts due to the concern, and it is quite possible that this may have been the very best arrangement that could have been made for compromising that large liability of *Hobbs* to the *Lands Allotment Company*. But I will assume it was not, and treat this for the purpose of argument as an investment in shares of the *Building Securities Company* of £35,000, which were the moneys of the *Lands Allotment Company*. I am very clearly of opinion that if they did buy shares in that company it might be an act beyond their powers—buying them, not, be it observed, as an *interim* investment of moneys that they wanted at the time to invest in

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certain securities, but buying them, as it appears they did buy them, as shareholders out and out in this *Building Securities Company*—shares which they intended to hold and which they did hold for a very long time afterwards. Then comes the question, what was the position of the directors who made an improper and *ultrà vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or *quasi* trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust. I do not believe that there has ever been any deviaton from the language of the late Sir *George Jessel* in the case of *In re Forest of Dean Coal Mining Company* (1). Sir *George Jessel* said this: "Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company." So that, when they get assets of the company under their control, or into their hands, and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust. Well, then, that is not denied; but it is said that they are not absolutely trustees, they are *quasi* trustees; and, being in that position, they do not come within, and were designedly omitted from, the definition of trustees in the Act of 1888, one section of which limits the liability of trustees. I entirely dissent from that argument. It seems to me the words used in the definition clause of that Act—the 1st section—do expressly include precisely such a case as a director dealing with moneys of the company in such a way as to make him liable as trustee, because the words are these: "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee." Now, how does this obligation of a director and trustee arise if it does not arise "by con-

(1) 10 Ch. D. 450, 453.

struction or implication of law"? It seems to me that the words are apt to include that very case, and were intended to include a case of that kind. It is said, by way of argument, "Why did not the definition clause expressly include directors?" But it would have been quite wrong to have included directors, because directors are not always trustees. As directors they are not trustees at all. They are only trustees *quâ* the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that *quâ* such fund they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Act, and therefore the 8th section of the Act, which applies to all persons who come within this definition of trustees, does apply to exonerate these directors from that misapplication of funds for which otherwise, I assume, they would have been liable.

But then it is said—and upon this part of the case I desire to add a few words to what Lord Justice *Lindley* has said—that if that was so, still the fact of this investment was concealed by a fraud of one of the directors in which the other directors concurred, and that concealment by fraud prevents time from running in favour of the directors until the fact was discovered. Well, I do not wish at all at present to express any decided opinion whether, if the fraudulent statement could be traced to all these directors and they could be made responsible for it, time would or would not run until it was discovered. The ordinary application of that doctrine is where you are suing people, and the ground of your action is the fraud which has been committed. Then undoubtedly where the ground of the action is fraud committed, time does not begin to run until the discovery of the fraud. That I quite admit. But it is not quite the same thing where the ground of the action is not fraud at all, but where the ground of the action was, as here, a perfectly honest misapplication of money—a misapplication made by persons who might not unreasonably believe they had power to do that which they were doing, and which was not as far as any one of them was concerned in the least degree a corrupt dealing. The investment of these moneys, however wrong it might be with regard to the powers

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of the company as being beyond those powers, could in no sense be said to be a fraud on the part of the particular persons who made the investment; and I do not wish to express any decided opinion as to the rights of the shareholders in respect of that investment if the fact of that investment had been fraudulently concealed from the shareholders. It might be that time would not begin to run until the discovery of the facts which gave them a right to sue.

But the question is, Is that fraud, if there was a fraud, brought home so clearly to these particular directors whom it is now sought to make liable as to bring them within that doctrine if such a doctrine exists? Now, if we were dealing with Mr. *Balfour* the case would undoubtedly be very different, because Mr. *Balfour*, according to the evidence before us, did make a statement at a public meeting of the shareholders which was, whichever view you take of the actual words used, whether it was "estate" or "asset," an utterly untrue statement; and if the action were against Mr. *Balfour* and it was said, "Time did not begin to run in your favour until the untruth of that statement was discovered by the shareholders, because that statement put them off their guard completely, and prevented them knowing the facts which gave them a right to sue you," I do not say that that argument might not prevail. But we have not got Mr. *Balfour* before us. The persons who are before us are persons who were present at that meeting, and it is sought to make them liable because they, being present at that meeting, must be taken to have heard Mr. *Balfour's* statement, and therefore to have concurred in that statement, and thus to have joined in misleading the shareholders. I am not prepared to say that the evidence is sufficient. All the evidence we have got is that they were at the meeting. I have no doubt that the directors at the time—all those directors, at any rate, who are sought to be charged—believed, as they say they believed, that this was a perfectly valid and proper transaction, and they had no ground whatever for concealing it, and in order to bind them by a false statement of this kind made by Mr. *Balfour*, speaking for myself, I should require it to be proved very clearly that they thoroughly apprehended the falseness of the statement that was made, and

concurred in it for the purpose of deceiving the shareholders who were present. I do not think the evidence comes up to that. The mere fact that they were present at the meeting does not seem to me enough to enable the Court to treat them as having committed a fraud for the purpose of concealing the actual facts from the shareholders in reference to this investment in the shares. Therefore, I think the learned Judge was quite right in treating them as absolved from liability for this investment by the lapse of time that has taken place.

Now, I will say only a few words with reference to points arising on the second summons, namely, the liability of Mr. *Brock* and Mr. *Theobold*, together with the two gentlemen who have been declared liable, *Barnard* and *Dresser*, for the second investment in the shares of the *Building Securities Company*. That investment was not made till 1889, and therefore six years had not run when this proceeding was taken against them to make them liable. The *Statute of Limitations*, therefore, has nothing to do with that case, and the only question is who were the persons who really did concur in making that investment, a thing beyond the powers of the company, and all the directors who did concur in that misapplication of the funds of the company to the extent of £5200 would be jointly and severally liable. *Barnard* and *Dresser* were the persons who were present at the meeting of the 1st of July, 1889, when it was resolved to make this purchase of further shares in the *Building Securities Company*, and they have been declared liable, and I understand there is no appeal on their part. *Brock* was at that time and had been for some time previously the chairman of the company. He was not present at that meeting; but before that meeting he had expressed at previous meetings his approval of the holding of the £35,000 of shares in the company. For example, on the 28th of November, 1888, he was present at the meeting when Mr. *George Dibley* was in the chair, and said this, in reply to a question by a correspondent: "We are perfectly satisfied with our investment in these shares. The investment pays us a very good rate of interest; we think it would be unwise at the present time to disturb it." Then again, on the 15th of April, 1889, he was at another shareholder's meeting; he was then in the chair and he said this: "The *Building*

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*Securities Company*, £35,427 10*s.*, is an item with which you are now becoming familiar. It represents shares in a company which pays a good dividend." Now, if Mr. *Brock* held those views as to the very advantageous nature of the first investment, and if the question had come before him, "Shall we increase our holding or not?" the great probability is that he would have concurred. Did he concur or did he not? I have said he was not present at the meeting of the 1st of July, 1889. He was present in October, 1889, at a meeting which confirmed the minutes of the meeting of the 1st of July, 1889, amongst other minutes, and then we have got that speech of his when he was in the chair on the 17th of April, 1890, which Lord Justice *Lindley* has read, where he says, "We have increased our holding in the *Building Securities Company*," and, after stating that they had offered additional shares, he says, "We carefully considered the matter, and having regard to the excellent return on our then holding, and our confidence in the management of the company"—that means the *Building Securities Company*—"we deemed it advisable that we should exercise our right of subscription, and we have had no reason to regret this decision, seeing that the company is paying an eminently satisfactory dividend of 7 per cent." Observe, this is said by a gentleman whose language I have read before of high approval of the first investment of £35,000. He was perfectly satisfied with it, thought it a very good investment, and thought it would be unwise to sell these shares. It is the language of a man who, if he had been asked to concur in this further investment, would most probably, judging from what he had said on previous occasions, have concurred without the least hesitation. Now, can any one reading this speech of Mr. *Brock* believe that the investment was made without his concurrence? I have listened with interest to all the ingenious arguments of Mr. *Marshall Hall* on the subject of the editorial "we," and so on. But the editorial "we" is not quite the same thing as the "we" of a director who, being at the time the chairman of a company, is speaking of an investment and says, "We carefully considered the matter and agreed that an investment ought to be made." I cannot possibly allow him to escape under that extremely ingenious argument from the conclusion to which

I have come from this statement of his own, that he was one of the persons who, before the investment was made, concurred in the propriety of making that investment, carefully considered it, and agreed that it should be done. That being so, I think it is clear that he must be made liable together with Messrs. *Dresser* and *Barnard*. As to Mr. *Theobald*, there is nothing to make him party to this further investment except the fact that he was present at the meeting of the 9th of October, 1889, at which, among other things, the minutes of the meeting of the 1st of July, 1889, were read and confirmed. I agree with Lord Justice *Lindley* as to that. I do not think there was enough in that circumstance alone to make him liable, looking to the evidence that he himself has given; and therefore I think that Mr. *Theobald* cannot be made liable as to this further investment.

A. L. SMITH, L.J.:—

My Brethren have fully covered this case as regards the different points which have to be adjudicated upon, and I entirely agree with them, and have nothing to add thereto, but I wish to say one word about the *Trustee Act* of 1888. As I understand the argument, it is this: It is said that within the Act there may be an express trustee, there may be a trustee whose trust arises by implication of law (I leave out "construction of law"), and there may also be a *tertium quid*, and the *tertium quid* which Mr. *Finlay* suggests is a gentleman in a fiduciary position Now I do not agree with him at all as to this *tertium quid*, for it seems to me that the *tertium quid* would be a man who is not an express trustee or whose trust arises by implication of law; and therefore would not be within the Act. But if he does come within this *tertium quid*, that is not being an express trustee or not a trustee whose trust arises by implication of law, he then has the ordinary *Statute of Limitations* to rely upon, which gives him a defence after a lapse of six years. If, however, the Respondents are express trustees, or trustees "whose trust arises by implication of law," then they have the defence of the *Statute of Limitations* which is afforded by this Act of 1888, unless they are deprived thereof by reason of the three exceptions which are set out in sect. 8 of the Act. Therefore it seems to me, whichever

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way you take this case, the *Statute of Limitations* is an available defence for these gentlemen.

I now come to the second point—the question of fraudulent concealment. That arises under both statutes, and it arises upon the fact that although under both statutes the Defendant may after six years plead the *Statute of Limitations*, yet, if there had been a sufficient fraudulent concealment, then he cannot set up the defence which is given to him either under the Act of 1888 or the old Act. I think there was no such fraudulent concealment in the present case. It seems to me, that as regards this £35,000, these gentlemen can rely on the limitations in the statute of 1888, inasmuch as they are gentlemen who were trustees whose trust arises by implication of law.

As regards the last gentleman, Mr. *Brock*, I agree with what the Lords Justices have said, though he thought he was acting in the best interests of the company, he did that which was *ultrà vires*—that which he cannot justify, and, therefore, he must be made liable in the present case for the £5200.

Solicitors for Appellant: *Phelps, Sidgwick, & Biddle.*

Solicitors for Respondents: *Snow, Snow, & Fox; Beaumont, Son, & Rigden; A. F. Church; E. Rawlings; W. D. Cunningham.*

M. W.

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1893
NORTH, J.
*Nov.* 24.
C. A.
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*Jan.* 22;
*Feb.* 8.

*Trade-mark—Registration—"Somatose"—"Invented Word"—"Reference to Character or Quality of Goods"—Descriptive Word—Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* 1—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

A word cannot be registered as an "invented word" under clause (*d*) of sect. 10, sub-sect. 1, of the *Patents, Designs, and Trade-marks Act,* 1888 (the section substituted for sect. 64 of the *Patents, Designs, and Trade Marks Act,* 1883), if it has any "reference to the character or quality of the goods" within sub-sect. (*e*).

The word "*Somatose*" (derived from Greek "*soma,*" *Angl.* "body"; genitive, "*somatos*") held not to be registrable, either as an "invented word" under sub-sect. (*d*) of the above sect. 10—"*somat*" being the root of many English words having reference to the body, and "ose" being a common English suffix—or as a word "having no reference to the character or quality of the goods" within sub-sect. (*e*), the Applicants having, when applying for registration, themselves described the article for which they proposed to use the word as applicable to the human body.

Decision of *North,* J., refusing application for registration, affirmed by the Court of Appeal (*Lindley, Kay,* and *A. L. Smith,* L.JJ.), *Lindley,* L.J., dissenting.

*In re Meyerstein's Trade-mark* (1) considered.

APPEAL from Mr. Justice *North.*

This was an application under the *Patents, Designs, and Trade Marks Acts,* 1883 and 1888, by the *Farbenfabriken Vormals Friedrich Bayer & Co.,* a manufacturing chemical company of *Elberfeld, Germany,* for the registration of the word "*Somatose*" in Class 3, under the Trade Mark Rules, 1890, in respect of a pharmaceutical product, stated to consist of "a yellow, tasteless, and odourless powder, easily soluble in water," sold in bottles, and described by the applicants as follows: "'*Somatose*' is a preparation made out of meat which solely contains ingredients of the same, and which can easily be absorbed and taken up into the human body. The object of the '*Somatose*' is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in the ordinary solid form; and further, that it can be taken in such cases where

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particular nourishment is required, through the addition of soluble, albuminous nourishment."

The word "*Somatose*" was, it was admitted, derived from the Greek word "*soma*," meaning a "body," the genitive being "*somatos*." The word "*Somatose*" was thus compounded of the word "*soma*," or root "*somat*," with the addition of the suffix "tose" or "ose." The Comptroller refused the application on the ground that the word had "reference to the character or quality of the goods" within sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883, as amended by sect. 10 of the *Patents, Designs, and Trade Marks Act*, 1888. The Applicants, on the 24th of November, 1893, moved, by way of appeal, before Mr. Justice *North*, that the Comptroller might be directed to proceed with the registration. It was said that this was a test case, intended to regulate a large number of similar applications.

*Kirby*, for the Applicants, contended, first, that the word "*Somatose*," being founded on a word taken from a dead language, was an "invented word" within clause (*d*) of sect. 10, sub-sect. 1, of the *Patents, Designs, and Trade Marks Act*, 1888, amending sect. 64, sub-sect. 1, of the *Patents, Designs, and Trade Marks Act*, 1883 (1); and, secondly, that it had "no reference to character or quality," within clause (*e*). [He cited *Re Burgoyne's Trade-mark* ("*Oomoo*") (2), and *Ford* v. *Foster* ("*Eureka*") (3).]

*Ingle Joyce*, for the Comptroller, contended that the root "*somat*" in "*Somatose*" formed the root of many English words

(1) Sect. 64, sub-sect. 1, of the *Patents, &c., Act*, 1883, as amended by sect. 10, sub-sect. 1 of the *Patents, &c., Act*, 1888, is, so far as material, as follows:—

"For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars:—

"(*a*) A name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or

"(*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or

"(*c*) A distinctive device, mark, brand, heading, label, or ticket; or

"(*d*) An invented word or invented words; or

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

(2) 61 L. T. (N.S.) 39.

(3) Law Rep. 7 Ch. 611.

having reference to the body, these words being found in the "Imperial," "Century," and other English dictionaries, and that the addition of the common suffix "ose" was no "invention"; also that, on the Applicants' own shewing, the word was descriptive of the article. [He cited *Humphries* v. *Taylor Drug Company* ("*Herbalin*") (1); *Re Grossmith's Trade-mark* ("*Emollio*") (2); *In re Leonard & Ellis's Trade-mark* ("*Valvoline*") (3); *Burland* v. *Broxburn Oil Company* ("*Washerine*") (4); *In re Leaf, Sons & Co.'s Trade-mark* ("*Electric*") (5); *In re Vignier's Trade-mark* ("*Monobrut*") (6); *Waterman* v. *Ayres* ("*Reversi*") (7); *In re Arbenz' Application* ("*Gem*") (8); and *In re Meyerstein's Trade-mark* ("*Satinine*") (9).]

*Kirby*, in reply.

NORTH, J.:—

I do not see how I can hold this word to be an "invented word," within sub-sect. (*d*) of the Act, having regard to the decisions with respect to such words as "*Herbalin*," "*Washerine*," and "*Valvoline*."

As regards sub-sect. (*e*), if I had this bottle in my hand, and knew nothing of its contents but what I see, I cannot say that the word "*Somatose*" would give me much information as to the "character or quality" of the powder-like substance within it. In the present case, the difficulty which I should have felt, if unaided, has been answered by the Applicants themselves, who call their powder "*Somatose*," and explain why they do so, namely, that it is applicable to the body; and that being so, it is impossible for me to say that this word is not in some way or other referential to "the character or quality of the goods." I think the Applicants' statement must be accepted, and that the word has reference to the applicability of the article to the human body, and therefore cannot be registered.

(1) 59 L. T. (N.S.) 820.
(2) 60 L. T. (N.S.) 612.
(3) 26 Ch. D. 288, 295.
(4) 42 Ch. D. 274.
(5) 34 Ch. D. 623, 643.
(6) 6 Rep. Pat. Cas. 490.
(7) 39 Ch. D. 29.
(8) 35 Ch. D. 248.
(9) 43 Ch. D. 604.

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The Applicants appealed.

The appeal was heard on the 22nd of January, 1894.

*Kirby*, for the Appellants:—

I claim that "*Somatose*" is registrable under sect. 10, sub-sect. 1, of the *Patents, Designs, and Trade Marks Act*, 1888, amending sect. 64, sub-sect. 1, of the *Patents, Designs, and Trade Marks Act*, 1883, either under clause (*d*) as "an invented word," or under clause (*e*) as "a word having no reference to the character or quality of the goods." With regard to this being an invented word, the alteration in the law by the Act of 1888 was intended to be in favour of the inventor, the word "invented" being substituted for "fancy," because the latter word put too great a difficulty in the way of the inventor. An invented word is not the less invented because, as here, the root is taken from some dead language.

[KAY, L.J.:—The Act requires an "invented word." Is it an invention merely to take a foreign word, put it into an English form, and then add an English termination?]

I submit so. For example, take the word "phonograph": both the words of which it is compounded are in more common use than the word "*soma*," and yet the combination may properly be held to be an invented word.

"*Somatose*" is entirely new to people generally: it is an "invented word" for the purposes of the public, and is not the less invented because it is derived from a Greek word. Though the Greek word "*soma*" is not itself an invented word it is, in this form, disguised beyond recognition. Again, this word may be registered under clause (*e*) as being non-descriptive, that is, as "having no reference to the character or quality of the goods." The word is too general to be descriptive. It implies nothing more than that it has something to do with the body. The word "*soma*," or "body," from which "*Somatose*" is derived, may mean matter, generally, as distinguished from mind: it is not confined to the body or flesh of a man or animal. It is equally applicable to any material substance, such as wood, stone, or iron. To any ordinary Englishman "*Somatose*" conveys no

meaning whatever. It certainly in no way describes this powder or indicates its nature. *Re Burgoyne's Trade-mark* (1) applies to this case. There, Mr. Justice *Chitty* held that the word "*Oomoo*," as applied to wine, being an Australian word meaning "choice," was not descriptive because it would not be understood. The question is, What does this word convey to an ordinary Englishman? As Lord Justice *Lindley* said in *In re Leaf, Sons & Co.'s Trade-mark* (2), the Act of Parliament is for an ordinary Englishman; and to an ordinary Englishman "*Somatose*" would be meaningless. *In re Meyerstein's Trade-mark* (3), cited against me in the Court below, is a different case, for there the word "*Satinine*," which was not allowed to be registered as being descriptive, was compounded from an English word and conveyed an obvious meaning.

[KAY, L.J., referred to *Waterman* v. *Ayres* ("*Reversi*") (4).]

Sir *J. Rigby*, S.-G., and *Ingle Joyce*, for the Comptroller:—

The registration of such a word as this would lead to great difficulty and confusion in the Comptroller's Office. The practice of applicants for registration is, in numberless cases, to sail as near the wind as possible without bringing themselves within the Act. Supposing this word were registered, the Applicants would thus get a monopoly of the word, and they would be at liberty to use it coupled with the description they now give, and say, "'*Samatose*' is a preparation of meat, and contains ingredients which can easily be absorbed and taken up into the human body," thus making it a descriptive word. They say they have taken their word from a dead language; but the word "*soma*" is a modern as well as an ancient word, for it is still used in modern *Greece*. Again, the root "*somat*" of the Applicants' word has been adopted in many words of the English language, in connection with medical or scientific subjects, as, for instance, in the case of "somatic" and other similar words to be found in the "Century" and other English dictionaries. The Applicants do nothing more than add the common suffix "ose" to a word or root in use in many English words.

(1) 61 L T. (N.S) 39.
(2) 34 Ch. D. 642.
(3) 43 Ch. D. 604.
(4) 39 Ch. D. 29.

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"*Somatose*" is no more an "invented word" than such words as "albumenose," "cellulose," "glucose," "maltose," "saccharose," and other similar words to be found in English books on diet and chemistry. You cannot take a common English word and, by adding to it an equally common English word, change it into an "invented word." Adaptation is not invention nor is discovery. A man may discover an old machine, but he would not be allowed to be the inventor. An "invented word" under the Act must also be clear of any reference to either character or quality. In *Re Burgoyne's Trade-mark* (1) the word "*Oomoo*" was held to be registrable because it conveyed no meaning to any ordinary Englishman; but here the Applicants say candidly that what they intend to convey to the public by the use of the word "*Somatose*" is that the article is applicable to the human body; and it was that which satisfied Mr. Justice *North* that he could not treat the word as invented.

[LINDLEY, L.J.:—Was it not intended by the Act of 1888 to let in a larger class of words for registration?]

No; the Act was intended to define rather than to enlarge, and to restrict the class of words capable of registration so as to render the duties of the Comptroller more easy.

[LINDLEY, L.J.:—The Act says you may have either an invented word "or" a word that is not descriptive.]

If the addition of a mere suffix were sufficient to make up an invented word, then such words as "breadose," "butterose," "beefose," or "maltose" would be invented words.

[LINDLEY, L.J.:—And why not?]

Because they would be descriptive, and thus fall within clause (*e*).

[LINDLEY, L.J.:—Is a compound word not "invented" if one of its components is old?]

At all events, an "invented word" does not include the taking of a dictionary word and adding a suffix which makes it a substantive. The principle of the legislation is that no man has the right to monopolize a descriptive word; therefore, an

(1) 61 L. T. (N.S.) 39.

"invented word" must be altogether invented, and that is not an invented word which conveys any meaning, or has "any reference to the character or quality of the goods": *In re Meyerstein's Trade-mark* ("*Satinine*") (1).

[KAY, L.J.:—Does not the passage in my judgment in that case (2)—"You cannot possibly use any word, fancy word or otherwise, if it is a descriptive word"—go too far?]

We submit not. Our contention is that, if a so-called "invented word" is descriptive, it cannot be registered as an "invented word."

*Kirby*, in reply.

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By sect. 10 of the *Patents, Designs, and Trade Marks Act*, 1888, it is enacted that for sect. 64 of the principal Act the following section shall be substituted: "64 (1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars." Now, stopping there, the expression, "For the purposes of this Act," means, "In order to be registered under the Act with the statutory benefits resulting from registration." Then the section goes on to state "the following essential particulars." [His Lordship then read clauses (*a*), (*b*), (*c*), (*d*), and (*e*), and continued:—] It does not follow that every trade-mark which does contain one at least of those particulars is a trade-mark for the purposes of the Act—that is, a trade-mark which the Comptroller ought to register. It is, therefore, necessary to ascertain what kind of trade-mark which does contain one of the statutory essentials is not a trade-mark for the purposes of the Act—that is to say, is one which ought not to be registered. Clause (*e*) by its negative form excludes certain words; and, if a trade-mark consists of one word only, and that word is such as is described by clause (*e*), that word cannot be properly registered as a trade-mark. I will return to clause (*e*) presently.

But in addition to this clause, sects. 70, 72, and 73 of the Act of 1883 exclude certain words from registration as trade-marks.

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These sections, and the discretion given by sect. 62, sub-sect. 4, of the Act of 1883 to the Comptroller to refuse to register a trade-mark, would clearly justify the rejection of any trade-mark, even if it contains one of the statutory requisites, if such mark be of an indecent or libellous character, or if it infringes the right of some other person, or if it is identical with or so similar to one already registered as to be calculated to deceive. But I can find no other restriction; and if a person seeks to register a trade-mark which is open to none of these objections, and which does contain one of the essentials mentioned in sect. 10 of the Act of 1888, I am aware of no legal principle which would justify the Court in refusing to direct its registration.

This discretion given to the Comptroller is subject to appeal to the Board of Trade (sect. 62, sub-sect. 4, of the Act of 1883); and, the Board of Trade having remitted the appeal to the Court under sect. 62, sub-sect. 5, of the same Act, the Court must decide the question in accordance with legal principles, and cannot properly decline to review the decision of the Comptroller.

The word now sought to be registered is "*Somatose*," and it is sought to be registered in respect of a substance falling within Class 3, the substance being a preparation from meat, and alleged to be nutritious and very digestible. The word is not objected to on any of the grounds mentioned in sects. 70, 72, and 73 of the Act of 1883, but it is said not to fall within sect. 10 of the Act of 1888. Two reasons are given for this contention. First, it is said that "*Somatose*" is not an invented word within the meaning of (*d*); secondly, it is said to have some reference to the character or quality of the goods and so to be excluded by (*e*). Each of these reasons must be examined in turn.

There is no statutory definition or description of an "invented word"; and I cannot myself see any legitimate ground for limiting its ordinary meaning. Any word which is in fact new, and not what may be called a colourable imitation of an existing word, is, in my opinion, an "invented word" within the meaning of the statute under consideration. It is true that several persons may independently hit upon the same word, but a word already invented and known would hardly be called an invented word because somebody afterwards happened to hit upon it himself.

Novelty is, I think, an ingredient in a lawyer's idea of invention.

Again, I do not think that a word can fairly be called an invented word if it is so nearly like a known word in spelling or sound as to be an obvious imitation of it and is in substance that word, though spelt or sounded a little differently. But I am unable myself to see that any other restriction can properly be put on the expression "invented word" in this Act of Parliament. Why, in 1888, Parliament substituted the expression "invented word or words" for the expression "fancy word or words not in common use," which was the expression used in the Act of 1883, I cannot ascertain from the statute itself. I can, therefore, only infer that the former expression, as construed by the Courts, was considered unsatisfactory, and that one object, at all events, was to change the expression so as to render the previous decisions on the old expression inapplicable in future. In my opinion, "*Somatose*" is an invented word within the meaning of the new enactment. It is proved to be new, and to have been invented for the purpose of being used as a trade-mark. It is true that the syllables of which it is compounded are well known, and are even in common use amongst chemists and medical men. But a new word of more than one syllable may be an invented word, although all the syllables composing it are known and are in use.

The only doubt which I have on this part of the case is that "*somatos*" is the genitive case of "*soma*," and is as well known as "*soma*" itself, and "*Somatose*" is very like "*somatos*." It is, in fact, composed of the same letters with the addition of an "e." But the words are, after all, different, and the evidence shews that "*Somatose*" was not in fact arrived at by adding "e" to "*somatos*," but by adding the English or Anglicized termination "ose" to "*somat*." Under these circumstances, "*Somatose*" may be fairly considered as an invented word.

We were pressed by the Solicitor-General to put a more restricted construction on the expression "invented word or words" on the ground of inconvenience. He urged that, if "*Somatose*" were registered, the Comptroller would have to register such words as "breadose," "butterose," &c., which

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shewed no inventive ingenuity, and the register would be crowded with ridiculous words, which would be intolerable. This, however, is a matter for the Legislature to consider, and not for this or any other Court. Inventive ingenuity appears to me not to enter into consideration. Trade-marks are not like patents, intended as rewards to inventors. Their main object is wholly different, and is to prevent one person from passing off his goods as those of somebody else. The Legislature, in passing the *Trade Marks Acts*, has also had for one of its objects the exclusion of inconvenient monopolies in words which are already, as it were, common property. If a person selects as a trade-mark for his goods a word which no one has ever heard of before, no injury is done to any one simply because he is prevented from taking the same word to designate his goods. The inconvenience, moreover, is not so great as represented. No one would care to register as a trade-mark a new word which would not be likely to attract customers and be remembered. A good catch-word is what is wanted, and this practically limits the choice of new words for trade-marks. The choice is still further very materially limited by the prohibition contained in sect. 10 (*e*).

This leads me to the second objection, namely, that "*Somatose*" has reference to the character or quality of the goods. I cannot myself, however, see that this is so. What character or quality of the goods does the word refer to? I am wholly unable to answer this question. The utmost that can be said is that "*Somatose*" refers in some way to some kind of body. Moreover, I do not believe that this objection would have occurred to any one if it had not been suggested by some statements made by the Applicants themselves and laid before the Comptroller. But the document containing these statements does not, in my opinion, support the objection. It in fact contains a protest against the inference now sought to be drawn from it.

I, however, agree with the contention of the Solicitor-General that, according to the true construction of sect. 10 of the Act of 1888, if a trade-mark consists of only one word, and that is an invented word so as to come within sect. 10 (*d*), but it is also a word having reference to the character or quality of goods, so as

to come with sect. 10 (*e*), the word cannot be properly registered as a trade-mark. The case supposed would stand thus: A trade-mark must consist of or contain an invented word or something else; but it must not consist of a word which has reference to the character or quality of the goods. If, therefore, an invented word has such reference it falls within the prohibition. This point has already been decided in *In re Meyerstein's Trade-mark* (1), and on this point I think that decision right, although I should myself have said that "*Satinine*," the word there, was an invented word.

I am of opinion that "*Somatose*" is an invented word not having reference to the character or quality of the goods, and is free from objection and ought to be registered.

KAY, L.J.:—

A German trading concern, called *Farbenfabriken*, applied to register the word "*Somatose*" in Class 3, in respect of a pharmaceutical product. The Comptroller objected "that *Somatose* has reference to the character or quality of the goods in respect of which registration is sought." This is denied; and, secondly, it is argued that, even if it were so, the word is an "invented word" to which such an objection does not apply. Mr. Justice *North* sustained the objection, and this is an appeal from his decision.

"*Somatose*" is a name given to a yellowish powder which is described by the Applicants as "a preparation made out of meat which solely contains ingredients of the same, and which can easily be absorbed and taken up into the human body. The object of the '*Somatose*' is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in the ordinary solid form; and further, that it can be taken in such cases where particular nourishment is required, through the addition of soluble albuminous nourishment."

The words "soma" and "somatic" occur in some English dictionaries. They are words derived from the Greek "*soma*," which means the body, or, applied to animals, the carcass of an

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animal; and the English words mean the body or carcass, and relating to the body or carcass respectively. The Greek word makes "*somatos*" in the genitive. "*Somatose*," then, is body or carcass with the addition "ose." This suffix is common, as in the words "comatose," "glucose," "cellulose," and many others. "Comatose" is the condition of coma; "glucose" and "cellulose" are certain preparations derived from the substances indicated in the earlier part of the words. Following this analogy, "*Somatose*" would mean a preparation of meat or of the carcass of an animal.

Sect. 64 of the *Trade Marks Act* of 1883 allowed the registration of "a fancy word or words not in common use." The constant attempts to register words as fancy words which were not really so led to a great deal of litigation, in which various views were adopted; some Judges considering that a fanciful use of a known word might bring it within the description; some Judges inclining to the view that a fancy word must be a word having no meaning; all concurring that a descriptive word ought not to be registered.

The Act of 1888 substituted a new definition. Instead of "fancy word or words not in common use" the new Act has, "(*d*) an invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name." This last provision certainly restricts still further the right of registration. "Having no reference to the character or quality of the goods" is more restrictive than the words "descriptive of the goods," which the course of decision had prohibited. But it is argued that this only applies to known words, and, being coupled with the former sentence by the disjunctive "or," an invented word may be descriptive, though a known word may not. To this, I think, there are two answers, either of which is conclusive. If the word is descriptive, it cannot be an "invented word" within the meaning of clause (*d*); and, secondly, the collocation of these two clauses proves to my mind that "invented words" mean words that have no meaning.

I agree with the argument of the Solicitor-General that, when the statutes of 1883 and 1888 are compared, the alteration of

sect. 64 was by no means intended to give persons desiring to register a larger right to monopolise words than they had under the former Act and the decisions upon it; but rather, if anything, to restrict that right still further, and to render the duty of the Comptroller more simple and easy.

The point came before me in *In re Meyerstein's Trade-mark* (1), where I refused to allow registration of the word "*Satinine*" for starch, saying: "This is a word which describes the quality of the goods; and there is extremely little invention in the matter, for the only invention is putting at the end of a common word 'satin'—which brings to every man's mind in a moment the notion of a glossy surface—the common conclusion 'ine,' which one finds in 'saline,' 'saccharine,' and numerous other English words. Certainly, if that is inventing a word, it is the easiest mode of invention one can possibly conceive. But I understand this Act of 1888 to be subject to the limitation which the decisions have put on the former Act—that you cannot possibly use any word, fancy word or otherwise, if it is a descriptive word." During the argument in the present case I put the question whether that last sentence did not go too far. Upon consideration, I do not think it does. It cannot be the meaning of the Act of 1888 that, although by sub-sect. (*e*) there is a prohibition against registering words having any reference to the character or quality of the goods, that may be evaded by compounding a word descriptive of the goods and treating it as an invented word under sub-sect. (*d*).

In my opinion, Mr. Justice *North* rightly refused to allow this word to be registered, and I think this appeal should be dismissed.

A. L. SMITH, L.J.:—

By the *Patents, Designs, and Trade Marks Act*, 1883, s. 64, so far as is material to the present case, it was enacted that for the purpose of the Act a trade-mark might consist of a fancy word or words "not in common use." This enactment gave rise to considerable litigation, as can be seen upon reference to the LAW REPORTS; and the Legislature, for the purpose of terminating

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the controversies which had been going on for some five years over the phrase, by the *Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 Vict. c. 50), s. 10, substituted a new sect. 64, of which sub-sect. 1 is as follows:—[His Lordship read the sub-section, and continued:—]

The question is, What is the true interpretation of sub-divisions (*d*) and (*e*) of this 1st new sub-section of sect. 64?

It will be seen that the phrase "a fancy word or words not in common use," is discarded. It appears to me that one thing is clear, viz., that the Legislature intended that, whatsoever words were thereafter to be registered, whether they fell within (*d*) or (*e*), they should be words which had no reference to the character or quality of the goods of the trader.

It is impossible, I think, to hold that the Legislature intended that an invented word might be a word having reference to the character and quality of the goods, whereas a non-invented word might not. There would be no sense in so holding, and it would not be the true construction of the Act.

Now, to constitute an "invented word" within the meaning of this section, in my judgment it must be a word coined for the first time. Such a word is, of necessity, incapable of having reference to the character or quality of goods, because, *ex hypothesi*, it is an entirely new, unknown word incapable of conveying anything.

This, in my opinion, is why it became unnecessary to repeat the limitation about reference to goods in (*d*), whereas it was necessary to insert it in (*e*).

Now, suppose a trader to go to a dictionary and to find a word wholly unused, and to propose to register the word, would that be an invented word within the section? I say it would not, because the word so found would not be a word coined for the first time, and it therefore might be capable of having reference to the character or quality of goods.

Suppose the trader therein to find two words equally unused, and to join them together, will that suffice? I think not; for the same reason, viz., that the two which were joined together, not being words coined for the first time, might, when joined, have reference to the character and quality of goods; whereas I

think that the essence of an "invented word" within the meaning of the section is that it is a word which of necessity is incapable of having any reference to goods, inasmuch as it is incapable of conveying anything.

Now, what is the word "*Somatose*" which is sought to be registered by the Applicants? I find in *Webster's* Dictionary the words "Somatic, Somatical. [Gr. *Somatikos*, from *Soma*, body]. Corporeal; pertaining to a body." In *Johnson's* Dictionary, there is the word "Somatic; from Greek *soma, somatos*, the body." In *Todd's* Dictionary will be found the word "Somatical, Somatick, Corporeal; belonging to the body." And in the Imperial Dictionary there are the words, "Somatic, Somatical. [Gr. *Somatikos*, from *Soma*, body]. Corporeal; pertaining to a body."

Now apparently what the Applicants have done is to take the well-known word "*soma*," and add thereto the not unknown adjunct "tose"—for instance, as in "coma," "comatose"—or they have taken the word "*somatos*" and added the letter "e"; and it is said on their behalf that they have "invented" a word within the meaning of the section. In my opinion they have not; for the word "*Somatose*" cannot be said to be a word coined for the first time, and consequently it is not a word which is of necessity incapable of having reference to the character or quality of goods. The meaning conveyed by the words *soma—somatos* was well known before; and, in my judgment, "*Somatose*," for the reasons above stated, is not an invented word within the section.

I now come to the next point under sub-division (*e*), which is this: Has the word "*Somatose*" no reference to the character or quality of the Applicants' goods? I find in a copy of remarks made by the Applicants which was forwarded by their solicitor to the Comptroller-General, that the Applicants describe the object to be attained by the use of "*Somatose*," which is a powder, and the ingredients out of which it is made.

They say, "The object of the '*Somatose*' is that it can be taken in all such cases in which meat and albuminous bodies are to be prescribed, but which cannot be given in ordinary solid form," and so on. They describe its ingredients in this way: "'*Somatose*' is a preparation made out of meat, which solely contains

C. A.
1894
*In re* FARBEN-FABRIKEN APPLICATION.
A. L. Smith, L.J.

ingredients of the same, and which can easily be absorbed and taken up into the human body." To state it shortly, they describe their goods which they call "*Somatose*" as being made out of meat which can be easily absorbed into the human body.

In these circumstances, I cannot bring myself to hold that the word "*Somatose*"—mainly composed of the words "*soma*" or "*somatos*," which means "the body," or "of the body"—has no reference to the character or quality of the Applicants' goods, which are made of meat, and can be easily absorbed into the body. This was the conclusion Mr. Justice *North* arrived at, and I think he was right.

Lord Justice *Lindley* not agreeing with me of necessity makes me doubt the accuracy of my judgment, and I am glad that Lord Justice *Kay* has arrived at a like conclusion to my own. I think that this appeal, for the reasons above, should be dismissed, but, this being a test case, without costs.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Solicitor to the Board of Trade.*

G. I. F. C.

## *In re* WHISTON'S SETTLEMENT. LOVATT *v.* WILLIAMSON.

CHITTY, J.
1894
*Feb.* 13, 14.

[1893 W. 1873.]

*Settlement—Equitable Estate in Fee—Limitations—No Words of Inheritance—Construction.*

An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.

*Meyler* v. *Meyler* (1) approved.

## ADJOURNED SUMMONS.

The only question raised by this summons which requires any report was, whether under a post-nuptial settlement made by one *George Whiston* his children took estates for life or in fee. The material facts were as follows:—

By a settlement of the 21st of August, 1845, after a recital that the said *George Whiston* was desirous of settling all his freehold and personal estate for the benefit of his wife, himself, and their children, the equity of redemption of certain freehold hereditaments was granted and assured to trustees and their heirs, upon trust for the settlor's wife for life, with remainder to the settlor for life, and after his death, "then as to and concerning the hereditaments and the rents and profits thereof," in trust for such child or children of the settlor as "being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain the age of twenty-one years, or be married under that age, which shall first happen, the same to be, if only one such child, paid, assigned, or transferred unto him or her solely, or if two or more such entitled children, then to be paid, assigned, or transferred in equal shares, as tenants in common, and the share of each such son is to be paid, assigned, or transferred at his age of twenty-one years, and of each daughter at her age of twenty-one years or day of marriage, which shall first happen, or so soon thereafter as the decease of the survivor of them," the said settlor and his wife, "will permit." The

(1) 11 L. R. Ir. 522.

CHITTY, J.
1894
*In re* WHISTON'S SETTLEMENT.
LOVATT v. WILLIAMSON.

settlement contained an advancement clause, empowering the trustees to raise any part not exceeding one moiety "of the share or portion or respective shares or portions of which any child or children shall be actually or presumptively entitled of and in the trust estate," and "so that the moneys to be raised and applied for any such child or children respectively be considered as part of his or their share or portion, shares or portions, under these presents."

*George Whiston* and his wife were both dead, and, there being no words of limitation in the settlement referring to the children's interest, the question now raised was, what estate they were entitled to under the settlement.

*Alexander*, Q.C., and *Albert Jessel*, as representing the interests of the settlor's children:—

In limitations of an equitable estate in fee, words of inheritance are not necessary. The earlier text-books all agree upon this point: *Cruise's* Digest (1); *Hayes'* Conveyancing (2); *Butler's* Note to *Coke* (3); *Williams'* Real Property (4). The intention of the settlor was to benefit his children; the fee was conveyed to the trustees, and the estates of the *cestuis que trust* should be commensurate; and then there is the direction that the shares are to be "paid, assigned, or transferred in equal shares as tenants in common," and the advancement clause, which both clearly point to something more than a mere life estate. Though the limitations are in form legal, still as the estates are equitable, it being an equity of redemption that was settled, the children took an equitable estate in fee. Further, as it is plain that the fee was intended to pass, the deed could if necessary be rectified by the insertion of the word "heirs": *In re Bird's Trusts* (5).

*Byrne*, Q.C., *Kenyon Parker*, and *Fawcus*, *contrà*:—

The settlement is executed, and not executory, and the estate of the children is limited by the plain words of the trust; they take life estates only: *Holliday* v. *Overton* (6). The more modern

(1) Vol. i. p. 343.
(2) 5th Ed. vol. i. p. 91.
(3) Page 290 b. xvi.
(4) 13th Ed. p. 165.
(5) 3 Ch. D. 214.
(6) 14 Beav. 467; 15 Beav. 480.

text-writers do not seem to agree with the older text-writers, and state that an equitable limitation by way of trust executed has the same construction as a legal limitation: *Elphinstone* on the Interpretation of Deeds (1); *Lewin* on Trusts (2); and *Meyler* v. *Meyler* (3) and *Middleton* v. *Barker* (4) follow the more modern opinion.

*Alexander*, in reply.

CHITTY, J.:—

The question I have to decide is, what interest these children took under the settlement of August, 1845. It is admitted that the real estate settled by *George Whiston* was only an equity of redemption, and that the legal estate therefore was, and still is, outstanding. The settlement contains a series of formal limitations in favour of the settlor's wife, the settlor, and their children; but when you come to read the actual words of limitation to the children, the words "heirs" or "fee simple" are not used. If the case had to be decided according to the doctrine of legal limitations, it is plain that these children would only take life interests; but the limitations are, as a fact, only of an equitable interest, and on this point some of the older text-writers, such as *Cruise* (5) and *Hayes* (6), seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law; so that the Court had some considerable latitude in the construction of equitable limitations like the present; but the more modern text-writers seem to have rather come round in their opinions, and in *Elphinstone* on the Interpretation of Deeds it is stated "an equitable limitation by way of trust executed has the same construction as a legal limitation." In *Lewin* on Trusts it is laid down that if an estate be conveyed by deed to the use of a trustee and his heirs, in trust for the settlor for life, and after his death upon trust for his children simply, without the

(1) Page 276, rule 104.
(2) 9th Ed. p. 114.
(3) 11 L. R. Ir. 522.
(4) W. N. (1873) 231.
(5) Vol. i. p. 343.
(6) Hayes' Conveyancing, 5th Ed. vol. i. p. 91.

CHITTY, J.
1894
*In re* WHISTON'S SETTLEMENT.
LOVATT *v.* WILLIAMSON.

word "heirs" the children by analogy to legal limitations take an estate for life only. These more modern statements of the law are opposed to the opinions of the older text-writers; still in support of this later view both the writers I have mentioned refer to and cite the three cases in *Beavan, Holliday* v. *Overton* (1) *Lucas* v. *Brandreth* (2), and *Tatham* v. *Vernon* (3), together with the latest decision on the subject, the Irish case of *Meyler* v. *Meyler* (4), a decision of *Chatterton*, V.C., where he considered himself bound by those three cases in *Beavan*, and came to a conclusion in accordance with the rule as laid down in *Elphinstone* on Interpretation of Deeds.

My impression is, that this very point has been decided by Sir *George Jessel*, but no such decision seems to have been reported, and I believe I have also decided this point myself. Admitting that I am not bound by *Meyler* v. *Meyler*, nevertheless I think the reasoning of the Irish Vice-Chancellor is correct, and that he came to a right conclusion. Then, in further support of this view, there is the case of *Middleton* v. *Barker* (5), in which, as far as I can make out from the *Weekly Notes*, *Bacon*, V.C., seems to have been of the same opinion.

For these reasons, and without considering it necessary to review all the authorities again in detail, I hold that these children took a life interest only under the settlement.

Some reliance was placed, in the course of the argument, on the recital that the settlor was desirous of settling all his freehold and personal estate for the benefit of his children, and it was said, that this would distinguish the case from the authorities in *Beavan*. In my opinion, that recital is not sufficient to carry the fee to the children; besides, the settlor, after having so far benefited them by giving them a life interest, might have intended the reversion in fee to result to himself.

Then the advancement clause was relied on as shewing that something more than a life estate must have been intended. I do not think this advancement clause makes any difference, or helps the argument for the children; the incautious draftsman

(1) 15 Beav. 480.
(2) 28 Beav. 274.
(3) 29 Beav. 604.
(4) 11 L. R. Ir. 522.
(5) W. N. (1873) 231.

seems to have got hold of an advancement clause suitable for a will, and to have put it into this deed; but no words there used are sufficient to enable me to decide otherwise than I have already done. The result, therefore, is, that though the interest of the settlor in the freeholds was equitable only, the true construction of this deed is such as I have already stated.

Solicitors: *Joseph & Hyam; Thomas White & Sons.*

W. C. D.

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## *In re* CLEMENTS. CLEMENTS *v.* PEARSALL.

[1893 C. 1090.]

CHITTY, J.
1894
*Feb.* 14, 15.

*Will—Specific Contingent Legacy—Right to Intermediate Income—Infant—Maintenance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator, after appointing executors and trustees, bequeathed a sum of £4000 *Victoria* Stock, held by him at the date of his will and at his death, to his trustees, in trust for such of his granddaughters as should survive him and attain the age of twenty-one years in equal shares; and devised and bequeathed the residue of his estate to the same trustees upon trusts for conversion and distribution as therein mentioned. The granddaughters, who were infants, now applied for maintenance out of the income of this contingent specific legacy:—

*Held*, following *In re Medlock* (1), that the legacy being segregated and vested in trustees for the benefit of the object of the gift when the contingency happened, the granddaughters, on attaining twenty-one, would be entitled to the intermediate income, and therefore that sect. 43, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, as interpreted by *In re Dickson* (2), applied, and the trustees had power to allow maintenance out of the income.

*Guthrie* v. *Walrond* (3), distinguished.

*Dictum* of *Jessel*, M.R., in *Long* v. *Ovenden* (4), corrected and explained.

## ADJOURNED SUMMONS.

*William Clements*, who died in December, 1892, by his will, dated the 15th of July, 1886, after appointing his wife and three other persons to be executrix and executors respectively, and trustees thereof, and giving certain pecuniary legacies,

(1) 55 L. J. (Ch.) 738.
(2) 29 Ch. D. 331.
(3) 22 Ch. D. 573.
(4) 16 Ch. D. 694.

CHITTY, J.
1894
*In re* CLEMENTS.
CLEMENTS v. PEARSALL.

bequeathed the sum of £4000 *Victoria* £4 per cent. Stock held by him at the date of his will, or which might be held by him at the date of his death, "to the trustees of this my will," in trust for such of his granddaughters, *Florence Lillie* and *Dora Winifred Pearsall*, as should survive him and attain in his lifetime or afterwards the age of twenty-one years, and if these conditions should be fulfilled in the case of each of them, then in equal shares between them. And he declared that, during the infancy of both or either of his said granddaughters, the trustees might sell the whole or any portion or portions of the said *Victoria* Stock, the title whereunto might still be contingent, and that the proceeds of such sale should be subject to the general provisions as to investment thereinafter contained. After making certain other specific devises and bequests, the testator devised and bequeathed all his real and personal property, not thereinbefore specifically disposed of, to the said trustees absolutely, upon trust for conversion and investment as therein mentioned, for the benefit of his said wife for her life, and afterwards for his daughters and their issue, other than his said granddaughters, *Florence Lillie* and *Dora Winifred Pearsall.*

At the date of his death, the testator was possessed of a sum of £4000 *Victoria* £4 per cent. Stock.

The granddaughters, *Florence Lillie* and *Dora Winifred Pearsall*, both survived the testator, and were now infants aged thirteen and a half and eleven years respectively; and their father, having applied to the trustees to pay the income of the £4000 *Victoria* £4 per cent. Stock to him, or otherwise apply the same for or towards their maintenance and education during their respective minorities, the trustees were willing to accede to this request if they could safely do so; but, being advised that it was doubtful whether the infants were entitled to the intermediate income, they took out the present summons for the determination of this and other questions arising in the administration of this estate. The summons was adjourned into Court and now came on for argument, the only point which calls for any notice being the question of maintenance.

*R. Burleigh Muir*, for the trustees.

*Levett*, Q.C., and *Underhill*, for other parties not interested in this question, took no part in the argument.

*G. J. Duncan*, for the granddaughters:—

There is an immediate gift to the trustees of this specific sum of stock, and a complete severance of it from the rest of the testator's estate; therefore the granddaughters are entitled to the intermediate income; when the contingency contemplated by the testator happens, they will be entitled to this legacy with all the accretions of income, and, according to *In re Medlock* (1), they are entitled to maintenance. The *dictum* of *Jessel*, M.R., in *Long* v. *Ovenden* (2), "if £10,000 Consols standing in the name of the testator, and so described, is given to *A.* on his attaining twenty-one, *A.* on attaining twenty-one, gets the £10,000 Consols as from the testator's death," exactly covers this case. [He was stopped.]

*Hickey*, for those interested in the residuary estate:—

The £4000 *Victoria* Stock is a mere contingent gift, which does not carry the intermediate income; the intermediate income, until the happening of the contingency, falls into the residuary estate: *Guthrie* v. *Walrond* (3). It is stated in *Theobald* on Wills (4) that a contingent specific bequest of chattels real or personalty, will not carry the intermediate profits, and there is no reported case which goes the length of deciding that a specific legacy, *ipso facto*, gives the intermediate income to the legatee.

[CHITTY, J.:—There is the illustration given by the late Master of the Rolls in *Long* v. *Ovenden* which is against you.]

The illustration is not correct, or not correctly reported.

[*Levett*, Q.C.:—*Hawkins* on Wills (5) states the rule, "with respect to specific bequests generally, the rule appears to be that the intermediate income does not pass to the legatee."]

(1) 55 L. J. (Ch.) 738.
(2) 16 Ch. D. 691, 694.
(3) 22 Ch. D. 573.
(4) 3rd Ed. p. 129.
(5) Page 44.

CHITTY, J.
1894
*In re* CLEMENTS CLEMENTS *v.* PEARSALL.

[CHITTY, J.: — Then the statement relied on in *Long* v. *Ovenden* (1) is wrong.]

[*Levett*:—I think, as it stands, it is; probably the Master of the Rolls meant to say, "If £10,000 Consols is given to *A.*, payable on his attaining twenty-one." Then the statement would be right.]

[CHITTY, J.:—As the Master of the Rolls was dealing with a postponed enjoyment, probably that is the explanation.]

Further, I say that *In re Medlock* (2) is distinguishable from the present case, because the testator there expressly provided that in the event of the grandchildren not attaining a vested interest, the £750 legacy was to fall into the residuary estate. There is no segregation of this legacy for the benefit of the granddaughters; it is in the names of the same trustees as the rest of the estate: *In re Inman* (3).

[*In re Dickson* (4), *In re Jeffery* (5), and *In re Adams* (6) were referred to.]

*Duncan*, in reply:—

*Guthrie* v. *Walrond* (7) was an immediate gift to a legatee at twenty-five, and is distinguishable on that ground; and, further, there was no gift to trustees. The result of the decision in *Long* v. *Ovenden* is in favour of the infants. The fund being at once set apart from the rest of the testator's estate carries income from the death: *Boddy* v. *Dawes* (8). I rely on the principle laid down *In re Medlock*, which is directly in my favour.

CHITTY, J.:—

The question is whether sect. 43 of the *Conveyancing and Law of Property Act*, 1881, applies to this trust legacy, so as to entitle these infants to maintenance. The testator makes the bequest in the following words. [His Lordship then read the bequest as above, and continued:—]

(1) 16 Ch. D. 691, 694.
(2) 55 L. J. (Ch.) 738.
(3) [1893] 3 Ch. 518.
(4) 29 Ch. D. 331.
(5) [1891] 1 Ch. 671.
(6) [1893] 1 Ch. 329.
(7) 22 Ch. D. 573.
(8) 1 Keen, 362.

In the events which happened, the testator was possessed at the time of his death of this exact amount of *Victoria* Stock, which accordingly passed to the trustees under the gift I have just read. The gift, therefore, was a specific gift to the trustees, to be held by them, upon the trusts mentioned by the testator.

Where a specific legacy is segregated from the mass of the testator's estate, to go on a contingency, it carries with it all accretions to the contingent legatee on the happening of the contingency. In the result, the authorities, notwithstanding a trifling slip in the judgment of the Master of the Rolls in *Long* v. *Ovenden* (1), which has been mentioned in the argument, establish this, that where there is a specific gift to an infant on his attaining twenty-one, the intermediate income does not pass. The late Master of the Rolls, in his judgment in *Long* v. *Ovenden*, was clearly intending to deal with a case of postponed enjoyment only, and not postponed vesting; and probably he meant to say, if indeed he did not actually say so, "If £10,000 Consols is given to *A.* payable on his attaining twenty-one." Then the illustration he gives would be correct.

In the present case there has been a double segregation: first the legacy is separated from the mass of the testator's estate, and then it is given to trustees, for the benefit of the contingent legatees, upon distinct trusts.

Supposing the testator had not died possessed of any stock of the description named, then it would have been a gift of a pecuniary legacy, and it would have been the duty of the trustees to invest it, and hold it on the trusts indicated by the testator.

My decision may, I think, properly turn on the principle laid down by Lord Justice *Kay* when Mr. Justice *Kay* in *In re Medlock* (2). In that case, a testator bequeathed to his trustees a sum of £750 upon trust to pay and divide the same equally between such of his three grandchildren, naming them, as should be living at his death, and should then have attained the age of twenty-one years, or have married, or should thereafter attain that age or marry—clearly on the happening of the contingency the grandchildren would take nothing unless they attained twenty-one or married. Then the testator went on to

(1) 16 Ch. D. 694. (2) 55 L. J. (Ch.) 738.

CHITTY, J.
1894
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provide, that in default of any such person attaining a vested interest, the £750 and the investments representing the same should fall into his residuary personal estate. Now, Mr. Justice *Kay* enunciates this proposition as the foundation of his judgment (1): "Therefore it seems to me upon principle that if it is clear upon the testator's will that he has directed the contingent legacy to be immediately set apart for the benefit of the objects of the gift when the contingency which he has indicated happens, when that contingency does happen the fund set apart with all its accretions belongs to the contingent legatees. The question is whether in this case I find such a segregation."

In the case before me there is no doubt that this legacy is segregated, and vested in trustees for the benefit of the objects of the gift, when the contingency happens, and therefore the intermediate income would, according to the principle of *In re Medlock* (2), belong to these contingent *cestuis que trust* on attaining twenty-one.

*Guthrie* v. *Walrond* (3) is not the same as the case before me. That was the case of a specific legacy given to a person on the happening of a contingency; and Mr. Justice *Fry*, in his judgment, says (4): "In the present case, as not only the enjoyment of the legacy is postponed, but the vesting itself is contingent, it follows that the interim income falls into the residue."

I cannot draw any distinction between the present case and the case of *In re Medlock*, as was suggested in the arguments, on the ground that in *In re Medlock* there was a direction that the £750 was to fall into the residue, in the event of the grandchildren not attaining a vested interest, because that clause only expresses in particular terms the general effect of a residuary gift such as that in the will before me. The result, therefore is, that I come to the conclusion that these two granddaughters, on attaining twenty-one, would be entitled to the intermediate income of this *Victoria* Stock, and therefore sect. 43, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, as interpreted by *In re Dickson* (5), does apply to this case, and the trustees

(1) 55 L. J. (Ch.) 739.
(2) Ibid. 738.
(3) 22 Ch. D. 573.
(4) Ibid. 578.
(5) 29 Ch. D. 331.

have power to allow maintenance out of the income. I may add that the decision in *Long* v. *Ovenden* (1), notwithstanding the slight error in the judgment to which I have already referred, is also an authority in favour of the result at which I have arrived.

Solicitors: *Morrisons*, agents for *Morrisons & Nightingale, Redhill; Robinson & Stannard.*

W. C. D.

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CHITTY, J.
1894
Feb. 22.

## *In re* TAYLOR.
## TAYLOR *v.* WADE.

[1893 T. 584.]

*Administration—Moneys representing Specific Legacy—Legatee Debtor to Estate—Retainer.*

Where a debtor to a testator's estate is a specific legatee of the profits of a business represented by moneys in the hands of the executors, the executors may retain such moneys as against the debt.

ADJOURNED SUMMONS.

*Joseph Taylor*, by his will, dated the 26th of February, 1889, appointed the Plaintiffs *Ethel Ada Taylor* and *John Slack Taylor* and the Defendant *Herbert Taylor* executors and trustees of his will, and he bequeathed to or in trust for various persons pecuniary legacies amounting in the aggregate to £25,000, and after reciting that he had lent to the said *Herbert Taylor*, and that there was then due from him to the testator on promissory notes £5600, being the amount of his contribution to the capital of a firm in which both the testator and *Herbert Taylor* were partners, the testator declared, and his will was, that in exercise of every power or authority enabling him in that behalf (which power was conferred on him by the partnership deed), he thereby nominated and appointed his executors to succeed him the said testator, and upon *Herbert Taylor's* death to succeed him the said *Herbert Taylor* in the co-partnership business upon trust that his executors should, during the period which should elapse

(1) 16 Ch. D. 691.

CHITTY, J.
1894
*In re* TAYLOR.
TAYLOR *v.* WADE.

before his son *Archibald Taylor* should attain the age of twenty-one years, continue the co-partnership and carry on the business as therein mentioned, and the testator bequeathed his share (including the share of *Herbert Taylor* in the event of his death) of and in the co-partnership business and the capital and goodwill thereof to the Plaintiffs upon trust that they should, during the period which should elapse before the attainment of the age of twenty-one years by or the death under that age of both *Aubrey Taylor* and the said *Archibald Taylor*, pay to *Herbert Taylor* during his life, and whilst neither of the said *Aubrey Taylor* and *Archibald Taylor* should have attained the age of twenty-one years, the whole of the profits of his (the testator's) share in the co-partnership business, and immediately *Archibald Taylor* should have attained the age of twenty-one years the testator gave his share of the capital and goodwill of the business (including, in the event of *Herbert Taylor* dying during the partnership, his share of such capital and goodwill) to *Aubrey Taylor* and *Archibald Taylor* in equal shares, subject to the payment by each of them, if and when he should come into possession of one-half of the capital and goodwill of the partnership belonging to *Herbert Taylor* by reason of his death during the partnership, of one-half of the sum of £5600, then payable as thereinbefore recited, to the executors and administrators of the said *Herbert Taylor*; and the testator appointed *Herbert Taylor* residuary legatee and devisee.

By a codicil dated the 22nd of March, 1890, the testator revoked the appointment of the said *Herbert Taylor* as an executor and trustee of his will.

The testator died on the 23rd of February, 1891. By an indenture dated the 26th of May, 1891, *Herbert Taylor* assigned all his share and interest in the capital and profits of the business to trustees for the benefit of his creditors.

The Plaintiffs, in accordance with the directions contained in the will, carried on the partnership business, and having in their hands a sum of £1256 which had accrued in respect of the profits of the testator's share in the partnership, this summons was taken out by them to have it determined whether they ought to retain the said sums and any further sums which might thereafter

accrue in respect of such profits before *Aubrey Taylor* and *Archibald Taylor* (who were both living) came of age, in or towards payment of the sums due to the testator's estate by *Herbert Taylor*, or whether they ought to pay the whole or any part of the said sums to the trustees of the deed of assignment of the 26th of May, 1891.

*Butcher*, for the Plaintiffs:—

I submit that the executors are entitled to retain this sum as against the debt owing to the estate from *Herbert*. No doubt that as against a specific devise of freeholds there is no right of retainer, and the same is the rule with regard to leaseholds and also specific chattels. But in this case there is a specific gift of moneys arising from the profits of the business, and the debt to the estate is payable in money—the hand to receive and the hand to pay is the same. *In re Akerman* (1) has no application to this case.

*C. W. Cecil Procter*, for the trustees of the trust legacies in the same interest.

*Buckmaster*, for the trustees of the deed of agreement:—

In *In re Akerman* Mr. Justice *Kekewich*, although he did not decide the point, was of opinion that it was contrary to principle to hold that there can be a right of retainer in respect of a debt owing from a specific legatee to the estate of a testator. There is no case shewing that the right exists. The same rule that applies to a specific devise of freeholds or a specific bequest of leaseholds or chattels is applicable to a case like the present, and therefore the executors have no right of retainer.

[He referred to *Cherry* v. *Boultbee* (2) and *Courtenay* v. *Williams* (3).]

*Grosvenor Woods*, Q.C., and *Theobald*, for *Herbert Taylor*, supported the latter argument.

*Procter*, in reply.

(1) [1891] 3 Ch. 212. (2) 4 My. & Cr. 442.
(3) 3 Hare, 539.

CHITTY, J.

1894

*In re* TAYLOR. TAYLOR *v.* WADE.

CHITTY, J.:—

Under the gift to the executors they have in hand a sum of £1256, representing the profits on the testator's share in the partnership. These profits are given to his son *Herbert*. It is argued for *Herbert* and his assignees that there is no right of retainer because the gift of these profits is a specific gift. The law is settled that as against a specific devise which is outside the duties of the executors there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If in such cases the right did exist it would be, not a right of retainer, but of lien.

Now if this rule were universal there would be no right of retainer in the present case. But I find here on either side a liquidated demand. The executors have money in hand payable to the legatee, and I think I should be unnecessarily narrowing the doctrine of retainer were I to hold that the right did not exist in this case. The person to pay and the person to receive is the same. The mass of the estate is diminished by the non-payment of a debt which is due to the testator's estate from the legatee. In my opinion, the executors have the right of retaining these profits as against the debt due from the legatee.

Solicitors: *Wade & Lyall; Tatham & Procter; Crosley & Burn.*

G. M.

NORTH, J.
1894
March 1.

## *In re* L'HERMINIER.
## MOUNSEY *v.* BUSTON.

[1893 L. 1868.]

*Settlement—Construction—Power of appointing Income.*

A testamentary power of appointing the income of personal estate was given by deed. "Subject to such appointment" of the income, trusts of the capital were declared:—

*Held*, that the power extended to the capital.

THIS was an originating summons to determine questions arising on the construction of a settlement made in 1863 in contemplation of the marriage between *Benedict Loys L'Herminier* and *Elizabeth Mounsey*, a certain deed of appointment, and the will of *Elizabeth L'Herminier*.

By the above marriage settlement personal estate was settled upon trust to pay the income to *Elizabeth Mounsey* for life, and after her death to "stand possessed of the dividends interest and income of the said trust funds in trust for such person or persons as the said *Elizabeth Mounsey* shall by her last will and testament in writing or any codicil direct limit or appoint, and subject to such appointment (if any) of the said dividends, interest and income," to "stand possessed of the said trust premises and the dividends interest and income thereof on trust for such person or persons as under the statutes of distribution would have become entitled thereto at the death of the said *Elizabeth Mounsey* had she died possessed thereof intestate and without having been married and if more than one as tenants in common." Mrs. *L'Herminier* died in 1877, having made a will by which she appointed the funds comprised in the settlement upon trust to pay the income to her husband for life, and after his death upon trusts which exhausted the whole interest in the settled funds. Mr. *L'Herminier* had recently died. One of the questions raised on this summons was whether Mrs. *L'Herminier* had an absolute power to appoint the capital of the trust funds comprised in the settlement.

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*Stallard*, for the trustee of the settlement.

*Butcher*, for some of the next of kin of Mrs. *L'Herminier*:—

The power of appointing the income of the fund was not intended to apply to the income for all time. The gift over is not made in default of appointment, but subject to such appointment (if any) of income; so that it is clear some interest was intended to pass under the gift over in any event. A power to appoint income in a settlement of personal estate must be construed to apply only to income during such period as the law will allow the property to be tied up. There is a difference between a gift of the income of land and the gift of the income of personal estate: in respect of the former a rule of law applies; in respect of the latter a rule of construction: *Mannox* v. *Greener* (1); *Adamson* v. *Armitage* (2).

*Mulligan*, *Darley*, *Stock*, and *Austen-Cartmell*, for persons interested under the appointment, were not called on.

NORTH, J.:—

The question is, how far can the appointment stand? It is said that the testatrix could not appoint the capital, but only the income of the trust funds, because there was a distinction between the trusts declared in respect of the income and in respect of the capital. For some reason I do not understand, that distinction is made in the settlement. But, giving full effect to the words of the settlement, what does that come to? The words in terms confer a power to appoint the income of the trust fund without any limit as to time. Why is not that a good power? Supposing an absolute owner of personal property to give the income of his property to a person, what does that person take? He has a right to receive the income for ever, and, having the right to the whole income, he has the right to dispose of the capital which produces that income. There is no difference between a disposal by a person having the absolute ownership of the income of a fund and the exercise of a power over the income of a fund in this respect. The power of appointing

(1) Law Rep. 14 Eq. 456. (2) 19 Ves. 416.

the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit. It is said that there was an intention to limit the period within which the income was to be appointed. If that is so, it is unfortunate that words have been used contrary to the intention of the parties. If the words are clear that the income may be appointed for ever, no intention to the contrary can be inferred without other words to shew that the power is intended to be cut down. Here there is no suggestion of the existence of such words; the only suggestion is that the income may be given for so long only as the law will permit property to be tied up, and no longer; but there is nothing whatever to justify such suggestion. In my opinion, the power did authorize the disposal of the income for an unlimited time, and this carries the power to dispose of the capital.

Solicitors for all parties: *Gray, Mounsey, & Fuller*, agents for *Mounsey, & Co., Carlisle.*

D. P.

STIRLING, J.
1894
Jan. 13.

# *In re* WHITEHEAD.
# PEACOCK *v.* LUCAS.

[1893 W. 3423.]

*Will—Construction—Vested Legacies payable at future Date—Fund set apart for—Interim Income—Capital or Income—Contingent Annuity—Surplus Income of—Tenant for Life and Reversioner.*

*B.*, the donee of a general testamentary power of appointment over the residuary estate of *A.*, deceased, by will, made in exercise of the power, appointed her residuary estate upon trust for *L.* for life with reversion to *L.'s* children, empowering her trustees to retain her estate in its actual state of investment at her death.

At the time of *B.'s* death, *A.'s* estate comprised (1.) a fund set apart and invested to answer certain legacies under *A.'s* will which had vested in the legatees at *A.'s* death, but were not payable until the legatees respectively attained twenty-five, and did not carry interest meanwhile; and (2.) Consols set apart to answer a conditional annuity payable or not at the discretion of *A.'s* trustees:—

*Held*, first, that, applying the principle of *Crawley* v. *Crawley* (1), *B.'s* interest in the interim income of the fund set apart to answer the legacies was in the nature of a terminable annuity, and that such interim income must, as between *L.* and her children, until the legatees respectively attained twenty-one, be treated as capital and invested, and that the dividends only of the investments must be paid to *L.*:

And, *held*, secondly (following *Cranley* v. *Dixon* (2)), that the surplus dividends of the Consols set apart to answer the conditional annuity must, after providing for the annuity, be paid to *L.* as income.

## ORIGINATING SUMMONS.

*Sarah Allen Abbott*, by her will, dated the 6th of December, 1890, after appointing the Plaintiffs executors and trustees thereof, gave and appointed to them all her real and personal estate upon trust for sale, conversion and investment, and, after payment of her funeral and testamentary expenses and certain pecuniary legacies and annuities, to invest the residue in any manner sanctioned by law for the investment of trust funds; and, after giving certain other legacies, the said testatrix gave to her stepson *S. T. Abbott* an annuity of £50 during his life conditionally on his not returning to *Europe*, or until he should assign, alien,

(1) 7 Sim. 427. (2) 23 Beav. 512.

charge or incumber, or by bankruptcy, insolvency, or otherwise, lose the personal benefit of the same, or any part thereof; and she gave to her executors and trustees full power and authority in their uncontrolled discretion to pay the said annuity from time to time in such manner in all respects as they might think fit, or to withhold and discontinue payment of the same whenever, from time to time, they might think fit in their own absolute discretion, and without being compelled to assign or give any reason for the exercise of such discretion either to the said *S. Abbott*, or to any other person claiming any interest, beneficial or otherwise, under the trusts of her will. And the said testatrix directed her executors and trustees to stand possessed of the residue of her real and personal estate upon trusts, under which she gave the sum of £3500 out of the same to each of the ten children therein named of her late husband *Samuel Abbott*, and directed that the said sums should not be paid to any of her said stepchildren, being sons until having completed his twenty-fifth year, and that the shares of such of her said stepchildren as might be daughters should be invested by her said executors and trustees, and held upon the trusts therein declared for them, their husbands, and children respectively. And the said testatrix gave the ultimate residue (if any) of her estate to her sister *Matilda Whitehead* for her life, and after her death upon trust for such persons as she might by will appoint, and in default of appointment, upon trust to permit the same to fall into her residuary estate; and the said testatrix directed her executors and trustees to set aside a competent sum in 2½ per cent. annuities to answer the said annuity of £50.

Mrs. *Abbott* died on the 18th of January, 1892, and after her death her executors set apart the sum of £2000 2½ per cent. annuities to answer the conditional annuity of £50 in favour of *S. T. Abbott*. *S. T. Abbott* was still living, and had done no act to forfeit his annuity. Six of the sons of *Samuel Abbott* to whom legacies of £3500 were given by the will of Mrs. *Abbott* were still under the age of twenty-five.

By an order of the Court dated the 3rd of June, 1892, and made in the matter of the estate of the said *S. A. Abbott* (*In re Abbott, Peacock* v. *Abbott* (1892 A. 406), it was declared that the

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legacies given by Mrs. *Abbott* to the sons of *Samuel Abbott* (except the said *S. T. Abbott*) carried interest from the date on which the said sons respectively attained the age of twenty-five, or from the expiration of one year from the date of the death of the said testatrix, whichever event should last happen. The residuary estate of Mrs. *Abbott* was sufficient to answer the legacies given to the sons of *Samuel Abbott*, and it was retained by the executors and trustees of her will to meet the legacies of the six sons of the said *Samuel Abbott* who were still under the age of twenty-five years, as and when such legacies respectively should become payable. All the other legacies given by Mrs. *Abbott's* will had been paid, and the annuity had been provided for as above mentioned.

*Matilda Whitehead* by her will, dated the 3rd of February, 1892, and expressed to be made in exercise of the testamentary power of appointment given to her by the will of Mrs. *Abbott*, after appointing the Plaintiffs her executors and trustees, and after giving certain legacies and annuities, devised, bequeathed, and appointed (such appointment being made in exercise of the powers given to her by the will of Mrs. *Abbott*) all the residue of her property, whether real or personal, upon trust for sale, conversion, and investment, and to hold the same, after payment of or providing for her debts, funeral and testamentary expenses, and the legacies and annuities given by her will, upon trust for *Rosa Ellen Lucas*, the wife of *William Lucas*, that was to say upon trust to pay the income to the said *Rosa Ellen Lucas* for her life for her separate use without power of anticipation, and after her death upon trust for such one or more of her children as she should by deed or will appoint, and in default of, and subject to any appointment, in trust for all her children who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, share and share alike; and in default of any children, upon trust for such person or persons as the said *Rosa Ellen Lucas* should by will appoint. And the said testatrix empowered her trustees to allow her estate to remain in the state of investment in which the same might be at the time of her death.

*Matilda Whitehead* died on the 19th of November, 1892,

leaving Mrs. *Rosa Ellen Lucas* her surviving. Mrs. *Lucas* had issue two children only, who were infants.

This was an originating summons taken out by the executors and trustees of the will of *Matilda Whitehead*, asking for a declaration whether the several interests thereinafter mentioned, over which the testatrix had a power of appointment by will under the will of her sister *Sarah Allen Abbott*, as part of the residuary estate of the said *Sarah Allen Abbott*, were to be treated as capital or income of the residuary estate of the testatrix—namely, (*a.*) the interim income of the fund held by the said *S. A. Abbott's* executors to meet the six legacies of £3500 which were vested at the said *S. A. Abbott's* death, but were payable only as the legatees respectively attained the age of twenty-five years, and did not carry interest in the meanwhile; (*b.*) the unapplied income from time to time of the fund held by the said *S. A. Abbott's* executors to meet the conditional and discretionary annuity of £50 a year, payable only in the uncontrolled discretion of the said *S. A. Abbott's* executors. The Defendants to the summons were Mrs. *Lucas* and her two infant children.

*Stuart Sankey*, for the executors and trustees, in support of the summons:—

There is no decision exactly in point upon the present case where the legacies are vested; but where a fund has been set apart to answer contingent legacies, it has been decided that, as between tenant for life and remainderman, the *interim* income arising from the fund must be dealt with as income, because, but for the contingency, the legacies would be residuary estate: *Crawley* v. *Crawley* (1); *Morgan* v. *Morgan* (2); *Allhusen* v. *Whittell* (3).

*Reginald Dodd*, for Mrs. *Lucas*:—

The principles applicable are the same whether the legacies are vested or contingent, and the case is governed by *Allhusen* v. *Whittell*. Mrs. *Whitehead*, by her will, gives her residuary estate upon trust for Mrs. *Lucas* for her life, with reversion to

(1) 7 Sim. 427. (2) 4 De G. & Sm. 164. (3) Law Rep. 4 Eq. 295.

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her children, as she shall appoint, giving her a general power in default. The primary intention, therefore, is to benefit Mrs. *Lucas* rather than her children, and the power to the executors to retain the fund in its existing state of investment shews the intention that Mrs. *Lucas* should enjoy the income from all sources, including that from the property set apart to answer the legacies, as income: *In re Thomas* (1).

[STIRLING, J., referred to *Howe* v. *Earl of Dartmouth* (2).]

*Fossett Lock*, for the infant remaindermen:—

There is perhaps no express authority in the case of a vested legacy; but the point was practically decided by *Allhusen* v. *Whittell* (3). Mrs. *Whitehead's* interest in the income of the fund set apart to answer the legacies until the legatees respectively attain twenty-one is clearly in the nature of a terminable annuity, and the general principle is that an annuity for a term of years being property of a wasting nature ought to be sold, or else that the income ought from time to time to be invested, and the income of the investments only ought to be paid to the tenant for life: *Crawley* v. *Crawley* (4); *Holgate* v. *Jennings* (5). As to the income of the fund set apart to answer the conditional and discretionary annuity, the point is covered by *Cranley* v. *Dixon* (6), and I cannot contend that the surplus, after providing for the annuity, is not income.

STIRLING, J.:—

In this case two questions arise under the will of Mrs. *Whitehead*, both of which relate to the funds derived by her under the will of Mrs. *Abbott*. [His Lordship then stated the facts as to the legacies of £3500, and continued:—]

Mrs. *Abbott*, by her will, gave the residue of her property to Mrs. *Whitehead*, and thus Mrs. *Whitehead* became entitled to the income arising from the fund set apart to answer the legacies until each of the stepsons attained the age of twenty-five, which event has not happened as yet as regards all of them.

(1) [1891] 3 Ch. 482.
(2) 7 Ves. 137 a.
(3) Law Rep. 4 Eq. 295.
(4) 7 Sim. 427.
(5) 24 Beav. 623.
(6) 23 Beav. 512.

Mrs. *Whitehead* had therefore, in substance, during those several periods, a terminable interest in the income of each of the legacies. Under these circumstances Mrs. *Whitehead* made her will, and, stating it shortly, she gave her residuary estate, of which this interest forms part, to Mrs. *Lucas* for life, with remainder to her children. The question is, therefore, whether the income which accrues on the fund set apart to answer these legacies, and which undoubtedly passed under the gift of the residue of Mrs. *Whitehead's* estate, is income payable to the tenant for life under her will, or capital which ought to be invested, so that only the income arising from the investments is payable to the tenant for life.

I have been referred to several cases in which it was held, that where a fund was set apart to answer contingent legacies the income arising from the fund until the legacies became payable formed part of the income of the residue. The latest case upon that subject that has been cited to me is *Allhusen* v. *Whittell* (1). In that case a fund had been set apart to meet contingent legacies, and it was contended that the income of the fund fell into the residue, not as income, but as capital. Vice-Chancellor *Wood*, in giving judgment, says (2): "As regards the contingent legacies, there is a great deal of force in the argument that if these legacies become payable, they are, like any other legacies, no longer residue; and, being no longer residue, the tenant for life ought not, upon principle, to be entitled to the income of the fund set apart to meet them, any more than to the income of any other part of the fund which may be necessary for the payment of any other legacy. I am not sure that the Courts, in some of the authorities cited, have sufficiently adverted to this reasoning; and whether they have not too narrowly followed words rather than things, when they said that this income is income of residue; because when it comes to be taken out it is no longer residue. However, I think I am bound by authority, and, upon principle, I consider the question as analogous to the cases, like *Sitwell* v. *Bernard* (3), and others, where the Court has been obliged, for the sake of not deferring to inconvenient

(1) Law Rep. 4 Eq. 295. (2) Law Rep. 4 Eq. 303.
(3) 6 Ves. 520.

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periods the distribution of property, as it were to intervene, and cut the knot. I apprehend the principle may be rested upon this, that the fund is residue until it is wanted; and if it be said that it ceases to be residue when it is not wanted, that rule may be a very simple one in one case, and a very complicated one in another." That judgment was entirely directed to a case where the legacies were contingent, and the reasoning was based upon the fact of the contingency; and the Vice-Chancellor seems to express the opinion that, if the legacies had been vested, the principle which he treats as established by authority would not have applied. It seems to me that the reasoning of the Vice-Chancellor as regards contingent legacies, and the period at which the tenant for life would become entitled to the income arising from a fund set apart to answer contingent legacies, does not apply in the present case, in which the legacies are vested; and I must treat the case as if the second testatrix, Mrs. *Whitehead*, had been entitled simply to a terminable annuity of a like amount as the income of the fund set apart for the legacies respectively.

If that is so, then, as has been pointed out by Mr. *Lock*, the principle of *Crawley* v. *Crawley* (1) applies; and it seems to me that the fund must be dealt with in the same way as the fund in that case—namely, that the income which accrues on the fund until the legatees attain twenty-five must be treated as capital and invested—and the tenant for life under Mrs. *Whitehead's* will can only receive the income arising from the investment, while the capital belongs to the remaindermen.

I cannot see anything in Mrs. *Whitehead's* will which prevents the principle of that case from applying. [His Lordship then referred to Mrs. *Whitehead's* will, and continued:—]

Reliance was placed by Mr. *Dodd*, in the first place, upon the trust for the benefit of Mrs. *Lucas*, which preceded the trusts limited for her for life with remainder to her children. That gift might, if she had had no children, have taken effect, upon the principle of *Lassence* v. *Tierney* (2); but it does not seem to me that it has any material effect upon the question how the fund in this case ought to be dealt with. Then, again, it was

(1) 7 Sim. 427. (2) 1 Mac. & G. 551.

said that the clause in the will which empowered the trustees to allow the testatrix's estate to remain in the state of investment in which it was at her death shewed that the intention was that Mrs. *Lucas* should enjoy this income as income; and in support of that I was referred to a case of *In re Thomas* (1), before Mr. Justice *Kekewich*. In my opinion, the decision in that case does not apply to the present. The clause in question may, no doubt, be useful, as enabling the trustees not to sell these terminable annuities; but the clause is an administrative one only, and cannot affect the rights of the parties so far as regards the mode in which the annual payments when received are to be dealt with.

This fund must be dealt with in the way which I have indicated, and I answer the first question by saying that the interim income of the fund until the legatees shall respectively attain twenty-five is to be treated as capital and invested, and the income only of the investments paid to Mrs. *Lucas* as tenant for life.

Then there is the question as to the unapplied income from time to time of the fund set apart to meet the contingent annuity payable at the discretion of Mrs. *Abbott's* executors. [His Lordship stated the provisions of Mrs. *Abbott's* will as to this annuity, and continued:—]

Subject to the payment of the annuity, the sum set apart to meet it forms part of Mrs. *Abbott's* residuary estate, and will pass under the gift of residue in Mrs. *Whitehead's* will. As I pointed out during the argument, this question is covered by the authority of *Cranley* v. *Dixon* (2); and the surplus income of the fund, if any, after providing for the annuity, must be paid to the tenant for life, and need not be capitalized. The costs of all parties must come out of Mrs. *Whitehead's* residuary estate.

Solicitors: *H. A. Dowse; Esmonde Dowse.*

(1) [1891] 3 Ch. 482. (2) 23 Beav. 512.

W. W. K.

STIRLING, J.
1894
Jan. 27.

# SMALL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

[1893 S. 4915.]

*Bill of Sale—Personal Chattels—Mortgage of Land together with fixed Machinery and Fixtures—Trade Machinery—Non-Registration—Invalidity—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

A mortgage, executed by a millwright and engineer of his freehold business premises, contained an assignment of such premises "together with all and singular the fixed and moveable plant, machinery and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments respectively." The deed also contained a separate covenant by the mortgagor to keep the plant, machinery and fixtures, &c., in good repair and insured against loss by fire.

There was upon the mortgaged premises certain fixed machinery which was trade machinery within the *Bills of Sale Act*, 1878.

The mortgage was not registered as a bill of sale:—

*Held*, that it was void with respect to the machinery, and that the mortgagee could not sell it either together with or apart from the mortgaged premises.

*In re Yates* (1) distinguished.

## MOTION.

The Plaintiff was the trustee appointed by an indenture dated the 5th of December, 1893, whereby *Anthony Stevenson*, of the *Seller Street Works, Chester*, millwright and engineer, conveyed and assigned all his property, real and personal, to the Plaintiff upon the trusts therein declared in favour of his creditors.

This deed was, on the 11th of December, 1893, duly registered under the *Deeds of Arrangement Act*, 1887.

By an indenture of mortgage dated the 9th of March, 1892, and made between *A. Stevenson* of the one part, and the Defendant bank of the other part, *Stevenson* covenanted to pay to the bank all such sums of money as were then, or should from time to time be, owing by him to them on current account or otherwise; and, for further securing the payment of the moneys so covenanted to be paid, he granted and assigned to the bank the hereditaments and premises described or referred to in the

(1) 38 Ch. D. 112.

schedule thereto, "Together with all and singular the fixed and moveable plant, machinery and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively." The deed contained a proviso for redemption on payment by the mortgagor of the moneys payable under the aforesaid covenant, and the mortgagor further covenanted that he would at all times during the continuance of the security keep the buildings which should from time to time be standing upon the hereditaments thereby assured, and the plant, machinery, and fixtures, implements and utensils, in a good state of repair, and in perfect working order, and also insured against loss or damage by fire. And it was thereby declared that the statutory power of sale should be exerciseable at any time after the expiration of three calendar months next after the moneys owing on the security should have become payable, or immediately upon the mortgagor being adjudicated a bankrupt or having a receiving order against him, without regard to the 20th section of the *Conveyancing and Law of Property Act*, 1881, which section should not apply to any sale made by virtue of the deed.

The mortgage deed was not registered as a bill of sale.

*Stevenson* used the land and buildings comprised in the mortgage for the purposes of his business of a millwright and engineer, and from time to time he brought upon the premises certain plant and machinery, which was trade machinery within the meaning of sect. 5 of the *Bills of Sale Act*, 1878.

On the 29th of November, 1893, the bank issued advertisements for the sale on two separate days of the hereditaments and the trade machinery and fixtures comprised in the mortgage.

On the 13th of December, the Plaintiff issued the writ in this action, claiming a declaration that the trade machinery and fixtures so advertised for sale were vested in him upon the trusts of the creditors' deed, and now moved for an *interim* injunction restraining the bank from selling, offering for sale, or otherwise disposing of as their own goods and chattels, the trade machinery and fixtures in question.

There was a considerable conflict of evidence as to whether

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the machinery was or was not in fact fixed to the mortgaged premises.

*Hastings*, Q.C., and *Broomfield*, for the Plaintiff:—

This trade machinery is expressly assigned by the mortgage deed, and the case is, therefore, distinguishable from *In re Yates* (1), in which there was no such express assignment of the chattels, but simply a conveyance of the land. The deed in this case, moreover, contains elaborate provisions for the insurance of the fixtures, which supports the view that they were dealt with separately from the freehold.

*Buckley*, Q.C., and *Beaumont*, for the bank:—

The mortgage is not a bill of sale. Even supposing it does include property which it ought not to include, having regard to the *Bills of Sale Acts*, it is not void altogether, but remains valid as to the property to which it can properly apply: *Ex parte Byrne* (2). This case is on all-fours with *In re Yates*, the only difference being that there the machinery was not expressly assigned.

[STIRLING, J.:—You say there is no real difference, because there the fixtures passed by implication under the *Conveyancing and Law of Property Act*, 1881, s. 6.]

Yes.

[STIRLING, J.:—But, having regard to the *Conveyancing Act*, the insertion of the words "together with all fixtures," &c., must have some meaning attributed to them.]

The reference to the fixtures is mere surplusage. There is nothing in the deed which gives the mortgagee the right to seize and sever and sell the fixtures apart from the land.

*Hastings*, in reply.

STIRLING, J.:—

The question which I have to decide is whether the mortgagees, under the deed dated the 9th of March, 1892, have any right

(1) 38 Ch. D. 112. (2) 20 Q. B. D. 310.

to certain fixed machinery upon the mortgaged premises, having regard to the provisions of the *Bills of Sale Acts.*

The deed is a mortgage of certain property described in the schedule. [His Lordship then referred to the provisions of the deed, and continued:—]

The question is whether that deed operates as a bill of sale with regard to this machinery, and for the purpose of determining that question it is necessary to consider the provisions of the *Bills of Sale Act*, 1878.

Sect. 4 provides that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt." "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." "Trade machinery" is defined by sect. 5 to mean "the machinery used in or attached to any factory or workshop," exclusive of certain things which do not include the fixed machinery now in question. "Factory or workshop" means "any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following"—certain purposes within which these premises fall.

The question is whether this trade machinery is trade machinery separately assigned or charged, or whether it is within the meaning of the Act "assigned together with a freehold or leasehold interest in any land or building to which it is affixed." Upon that point there is authority which I have to consider. In the first place, it was decided by the Court of Appeal in *Ex parte Byrne* (1), that the mere fact of a bill of sale including property which it ought not to include, having regard to the

(1) 20 Q. B. D. 310.

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provisions of the Act of 1878, did not make the bill of sale void *in toto*. I am asked to apply that decision to the present case.

It has also been decided in *In re Yates* (1) that where there was a simple conveyance of land with a power of sale, the instrument effecting that was not a bill of sale within the meaning of the *Bills of Sale Act*, 1878, as regards machinery which passed only by virtue of being affixed to the land. Lord Justice *Lindley* says (2): "The question we have to decide is this, whether a mortgagee of a mill, under a mortgage framed as this is, can seize and sever and sell, apart from the land or mill, the trade machinery on it. If he can, then it strikes me, that, as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale, and void because it is not registered. Now in order to dispose of that question we must look at the mortgage and see what it is. It consists of two distinct parts, first, there is the conveyance, subject to a proviso for redemption, and then there is the power of sale. The two portions must be considered separately. For the purposes of the *Bills of Sale Act* it is necessary to ascertain the character of the instrument as a conveyance or assignment. Can anybody, with any regard to accuracy of language, say that a mortgage of land in fee simple is an assurance of personal chattels? It is impossible; and it is not the less impossible because the land by force of law carries with it things which are affixed to it, and which if detached from it would be personal chattels. Neither does trade machinery which follows the land become personal chattels for the purpose of considering the question whether a conveyance of the land is an assignment of it. The trade machinery passes as a portion of the land, not as personal chattels; and, if you look at this conveyance, you cannot find, from first to last, anything about personal chattels. If you can import into it all the general words found in sect. 6 of the *Conveyancing and Law of Property Act*, still you cannot come to the conclusion that this is an assurance of personal chattels in the correct acceptation of the word. It is a mortgage of land, nothing more, nothing less." Contrasting that with the deed in the present case, and applying

(1) 38 Ch. D. 112. (2) 38 Ch. D. 124.

the law there laid down to the facts of this case, we have not here simply a conveyance of land; more than that, we have not simply a conveyance of land and fixtures, but the conveyance is of land "together with all and singular the fixed and moveable plant machinery and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises." In this deed, in that respect differing from that which was the subject of consideration in *In re Yates* (1), we do find something about personal chattels, because personal chattels are plainly assigned *quâ* chattels, and not as a portion of the land. It is contended that the reference to fixtures in the deed is nothing more than the insertion of a portion of the words which would be introduced into the deed by virtue of sect. 6 of the *Conveyancing Act*, which provides (sub-sect. 2) that "a conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, (*inter alia*) all outhouses, erections, and fixtures appertaining to the land, houses, or other buildings conveyed." In truth, the contention is that the reference in the deed to the fixtures is so much surplusage. But a deed ought to be construed so as to give effect, if possible, to every word contained in it, and I have to be satisfied that the object of the parties was merely to secure, by way of precaution, that something should pass which would have passed under a conveyance of the land alone without any reference to the fixtures. I cannot come to any such conclusion. Not merely are the fixtures mentioned, but they are grouped along with the moveable plant, the grant being "Together with all and singular the fixed and moveable plant machinery and fixtures"; and it seems to me that the intention of the parties was to confer on the grantees under the deed a right to that fixed plant in addition to any right which they would have simply as grantees of the land, and to confer the same rights in respect of the fixed plant as were intended to be conferred with reference to the moveable plant in immediate connection with which it is mentioned. That view receives some confirmation from the frame of the covenant for insurance by

(1) 38 Ch. D. 112.

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which the mortgagor covenants to keep insured, not merely the buildings which are mentioned first, but also "the said plant, machinery, fixtures, implements, and utensils"; so that it specifies all the plant mentioned in the earlier part of the deed as to be insured in addition to the buildings. That being, in my view, the true construction of the deed, it falls within the first portion of the passage which I have quoted from the judgment of Lord Justice *Lindley*, so that the mortgagees can seize and sever and sell, apart from the land itself, this fixed trade machinery on it; and his Lordship lays it down, that if you once find that, then the deed is to be regarded as a bill of sale, and void if it be not registered.

If I had come to a contrary conclusion there would have been a further question to be decided, as to which it seems to me that the evidence is sufficient for an interlocutory injunction, although possibly not sufficient to enable the case to be completely decided as if this were the trial.

In any case, it seems to me that I must grant an injunction to restrain the Defendants from selling. It is admitted that they cannot properly sell apart from the land; and I also think that, under the circumstances which I have stated, the judgment in *In re Yates* (1) does not apply, and that they cannot sell it along with the land. I accordingly grant an injunction in the terms of the notice of motion.

[It was ultimately agreed that the hearing of the motion should be treated as the trial of the action; and the injunction as perpetual.]

Solicitors for the Plaintiff: *Ernest A. Fuller*, agent for *E. Brassey, Chester.*

Solicitors for the bank: *Wilde, Berger, & Moore.*

(1) 38 Ch. D. 112.

G. A. S.

# *In re* BAWDEN.
# NATIONAL PROVINCIAL BANK OF ENGLAND *v.* CRESSWELL.
# BAWDEN *v.* CRESSWELL.

KEKEWICH, J.

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*Dec.* 12, 19.

[1892 B. 2596.]

*Will—Administration—Charge of Legacies on Residuary Real Estate—Gift of Real and Personal Estate "not otherwise disposed of"—Payment of Debts—Deficiency of Personal Estate—Contribution by Real Estate.*

The principle of *Greville* v. *Browne* (1), whereby under a gift of legacies, followed by a gift of residuary real and personal estate, the legacies are held to be charged on the residuary real estate, is not confined to cases in which the residuary real and personal estate are given together as "residue," or "the rest" or the like.

A testator, after making specific devises and bequests, bequeathed pecuniary legacies, and then gave, devised, and bequeathed all the real and personal estate to which at his death he should be beneficially entitled "and not otherwise disposed of" to his executor absolutely. The personal estate was insufficient for the payment in full of the debts and pecuniary legacies:—

*Held*, that the principle of *Greville* v. *Browne* applied, and that the legacies were charged on the residuary real estate.

*Hassel* v. *Hassel* (2) followed.

*Held*, also, that the pecuniary legacies were not liable to contribute to the debts, but that the residuary real estate must contribute to the debts rateably with the specific devisees and legatees, according to its full value without deducting the amount of the pecuniary legacies.

*In re Saunders-Davies* (3) and *Raikes* v. *Boulton* (4) followed.

*Long* v. *Short* (5) considered.

THE Rev. *Joshua Bawden*, of *South Molton, Devon*, by his will, dated the 25th of February, 1886, appointed his nephew, *Sackville Bawden Cresswell*, solicitor, executor thereof; and after devising a freehold messuage at *South Molton* to the testator's sister for life, and after her decease to *S. B. Cresswell* in fee, and certain freehold farms to the use of the testator's wife, *Ellen Bawden*, during her life (subject to certain conditions as to insurance and waste), and

(1) 7 H. L. C. 689.
(2) 2 Dick. 527.
(3) 34 Ch. D. 482.
(4) 29 Beav. 41.
(5) 1 P. Wms. 403.

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after her death to *S. B. Cresswell* in fee, the testator proceeded as follows: "I bequeath the following legacies, that is to say, To my sister *Mary Froude Bellew* . . . . the sum of five pounds; To my sister *Cecilia Sarah Evens* . . . . the sum of one hundred pounds; To my niece *Cecilia*, the wife of *Richard Stawell Bryan* . . . . the sum of five hundred pounds; and I give, devise and bequeath all the real and personal estate to which at my death I shall be beneficially entitled, or of which at my death I shall have any general power to dispose beneficially by will, and not otherwise disposed of, unto the said *Sackville Bawden Cresswell* for his own use and benefit absolutely."

The testator made four codicils to his will, and thereby modified the life estate of his wife in his freehold farms, specifically bequeathed to her certain bank shares, and gave her a life interest in his furniture and certain specific chattels, with remainder to his nephew *S. B. Cresswell*; but did not otherwise alter his will.

The testator died on the 11th of June, 1891, and his will and codicils were duly proved.

This action was commenced, by originating summons, by the *National Provincial Bank of England, Limited*, on behalf of themselves and all other the creditors of the testator, against *S. B. Cresswell*, the sole executor and residuary legatee, for the administration of the testator's real and personal estate.

The widow subsequently paid off the Plaintiffs, the bank, and took an assignment of their securities; and the action was then ordered to be carried on between the widow as Plaintiff, and *S. B. Cresswell* as Defendant.

An administration order was made on the 11th of July, 1892, and from the accounts and inquiries it appeared that the testator's personal estate was insufficient for the payment in full of his debts and pecuniary legacies. The question then arose whether the pecuniary legacies were a charge upon the residuary real estate, when the Chief Clerk, by his certificate, dated the 10th of August, 1893, found that they were "not" so charged.

*Cecilia Bryan*, as legatee under the will, having obtained an order giving her liberty to attend the proceedings, took out a summons asking that the certificate might be varied by striking

out the word "not"; and this summons was adjourned into Court, and now came on to be heard, together with the further consideration of the action.

*Renshaw*, Q.C., and *A. Whitaker*, for the legatee, in support of the summons:—

This case is within the principle of *Greville* v. *Browne* (1), as stated by Lord *Campbell* (2), and the legacies are therefore a charge on the residuary real estate. There is no special virtue in the use of the word "residue." A gift by a testator of all the real and personal estate "not otherwise disposed of" by him is in substance a gift of the residue of his real and personal estate; and the principle applies wherever there is a disposition of the residue or remainder of a mass of real and personal estate, less what has already been given in the form of pecuniary legacies. *Greville* v. *Browne* is referred to, not as laying down any new principle, but as a decision of the House of Lords enunciating a principle to be found in previous cases. The nearest case to the present is *Hassel* v. *Hassel* (3), where the testator, after giving pecuniary legacies, gave, devised and bequeathed "all and singular my real and personal estate not herein disposed," and it was held that the legacies were charged on the residuary real estate. That case, which is not distinguishable from the present one, was referred to with complete approval by Lord *Cottenham* in *Mirehouse* v. *Scaife* (4), and Lord *St. Leonards* in *Ireland* in *Smith* v. *Butler* (5), and was treated by both those learned Judges as being a case of a gift of residue. The meaning of the words "not herein disposed of" is well shewn by *Green* v. *Dunn* (6), where, after making a specific devise, a testatrix devised all her freeholds, &c., "not hereinbefore devised," and, the specific devisee having died in the lifetime of the testatrix, it was held that the specifically-devised estate passed as part of the residuary real estate. Further, in this case the gift of residuary real and personal estate is to the person who is also appointed executor, and that is an important

(1) 7 H. L. C. 689.
(2) Ibid. 697.
(3) 2 Dick. 527.
(4) 2 My. & Cr. 695, 707.
(5) 1 J. & Lat. 692.
(6) 20 Beav. 6.

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circumstance in favour of the claim of the legatee: *Peacock* v. *Peacock* (1).

*Upjohn*, for the Defendant, the executor and residuary devisee and legatee:—

Accepting entirely the principle of *Greville* v. *Browne* (2), as stated by Lord *Campbell*, I submit that this case does not come within it. The principle applies only where there is a gift in terms residuary: this proposition is really involved in the language of Lord *Campbell*, and Lord *Kingsdown* (3) intimates that the principle is not to be extended beyond the case of a gift of residue. Everything turns on the use of the word "residue," or some equivalent expression, such as "rest," "remainder," "balance," or the like. *Greville* v. *Browne* was so treated by *Jessel*, M.R., in *Gainsford* v. *Dunn* (4), and by *James*, L.J., in *Elliott* v. *Dearsley* (5), where he says that the charge of legacies arises "by force of the word 'residue.'" On the construction of this will there is nothing to weld or blend the real and personal estate together into one mass. "All my real and personal estate not otherwise disposed of" can mean no more than "all my other real and personal estate." In order that the principle of *Greville* v. *Browne* should apply, there must be words shewing that the testator has treated the whole of his estate as one blended mass of which this is the rest or residue. In *Hassel* v. *Hassel* (6) there were special circumstances: the testator used the word "devise" in giving personal estate, and directed that the legacies should be paid by his executor, to whom he had given his real estate; the reasons for the judgment of Lord Chancellor *Bathurst* are not stated, and his decision apparently turned upon the special wording of the will. There is nothing in that case to interfere with the views of *Jessel*, M.R., and *James*, L.J., in *Gainsford* v. *Dunn* and *Elliott* v. *Dearsley*. *Green* v. *Dunn* (7) is not in point. No doubt, the words "not otherwise disposed of" are sufficient to carry property ineffectually given by reason of lapse; but it does not follow

(1) 34 L. J. (Ch.) 315.
(2) 7 H. L. C. 689.
(3) Ibid. 705.
(4) Law Rep. 17 Eq. 405, 408.
(5) 16 Ch. D. 322, 329.
(6) 2 Dick. 527.
(7) 20 Beav. 6.

that in every respect a gift so worded is equivalent to a gift of residue.

*Warmington*, Q.C., and *Stokes*, for the Plaintiff *Ellen Bawden*, took no part in the argument.

KEKEWICH, J:—

In order to ascertain the meaning of a testator using ordinary language—that is to say, using the English language as it is ordinarily used—one has to be guided by two cardinal rules—one of them, to my mind, of the first importance beyond everything else in the construction of wills and other written documents, but especially of wills; the other not establishing an extension of the first, but really going side by side with it, and not applicable with the same generality. The first rule is that which has been expressed by many Judges in many cases, notably by Lord *Wensleydale* in *Greville* v. *Browne* (1); but more strongly, if I may venture to say so, and more plainly in a case which has only just been reported of *In re Morgan* (2), where Lord Justice *Lindley* (3) says this: "I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it." That is, to my mind, the first rule to bear in mind beyond everything else. But if a series of decisions, accepted by the profession, and presumably known to all testators, or, at any rate, to those whose duty it is to prepare their wills, have established that certain words and certain phrases mean certain things and have a certain result, then effect must be given to that, and those words must have that meaning, and that only, and you really are but using them grammatically, according to

(1) 7 H. L. C. 703. (2) [1893] 3 Ch. 222.
(3) [1893] 3 Ch. 228.

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the dictionary, because the dictionary is to be found in those decisions. And that is what Lord *Wensleydale* says in *Greville* v. *Browne* (1), following the passage I referred to just now (2): "If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases." Those two rules must be followed by me here.

Far be it from me to inquire—indeed, I have no right to inquire, as was pointed out by Lord *Campbell* in *Greville* v. *Browne*—what the language of this testator's will might mean if the matter was *res integra*; because the language which he has used has been interpreted by judicial decisions, and the testator must be assumed to have used the language which he uses with reference to those judicial decisions, and as meaning what they say it does mean. I have found, and no doubt there may be found elsewhere, decisions on the point now before me both before *Greville* v. *Browne* and since; but I find in *Greville* v. *Browne* a clear and distinct rule, which, of course, cannot be dissented from, being a decision of the House of Lords, but which, as a matter of fact, has been the basis of decision and advice over and over again ever since the year 1859. That rule is laid down by Lord *Campbell* in these words (3): "If there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift." That, I take it, is a general rule which ought not to be frittered away by verbal distinctions, and Lord *Campbell* does not mean, his words do not mean, and the decision in *Greville* v. *Browne* does not mean, that the testator must in language give the "rest and residue," or even the "rest" or the "residue." What is meant is that if he has in effect given the rest or the residue

(1) 7 H. L. C. 689. (2) 7 H. L. C. 703.
(3) 7 H. L. C. 697.

of his property in such a way that he has blended the whole of it in one mass, that is evidence of an intention that the legacies shall come out of that mass, which is only formed, in its ultimate and concrete shape, after the deduction of those legacies. Passages have been cited to me to shew that two learned judges, Sir *George Jessel*, M.R., and the Lord Justice *James*, whose decisions are entitled to the very greatest respect, have considered that the rule is only applicable where there is the use of the word "residue," or something else, of course, equivalent to it. It has not been argued that there is not a gift of residue within the rule if you find the word "rest" or some word of that kind used. The decision of Sir *George Jessel*, M.R., which has been referred to is in *Gainsford* v. *Dunn* (1). He refers to *Greville* v. *Browne* (2), and to two cases before the Vice-Chancellor *Wood*, and says (3): "Those cases were cases of a gift of residue of real and personal estate; but the result of the cases is this: that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and rateably upon the mixed fund." I observe that he takes the hypothetical case where you find a gift of legacies followed by a gift of the residue of real and personal estate. Taking that, he uses the word "residue," and as he has himself inserted that word in the hypothetical gift it is necessarily imported into the statement of the result which follows on the hypothetical gift. I do not understand Sir *George Jessel* to say that, in order to apply the principle of *Greville* v. *Browne*, you must necessarily have a gift of residue by the word "residue." To say that he meant that the actual word "residue" must be used would be an insult to the memory of that learned Judge. But I go further, and say that if he meant that you must find the gift equivalent to a gift of residue in some one word or some two words he was stating the rule too narrowly, and that if it has to be decided whether or not the rule applies to a gift which in substance amounts to a gift of residue, that

(1) Law Rep. 17 Eq. 405. (2) 7 H. L. C. 689.
(3) Law Rep. 17 Eq. 408.

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question must be answered in the affirmative. Then I am also referred to the language of the Lord Justice *James* in *Elliott* v. *Dearsley* (1). There he says: "The legacies are no doubt charged on the real estate by force of the word 'residue,' but there is no direction to pay them out of the mixed fund." Having got the word "residue," he says that the legacies are charged by force of the word "residue." But it would be wresting his language unduly to say that the Lord Justice *James* meant that you must have the use of the word "residue" in order to effect the charge. As to that, I should make the same remarks as on the judgment of Sir *George Jessel* if there were room for them; but there is far less room for them as regards the language of the Lord Justice *James*. I do not hesitate to say that as at present advised (though if it were necessary to decide the point I should like to consider it further), I think this residuary gift would have been quite sufficient to bring the case within *Greville* v. *Browne* (2), even if two or three words which occur had not occurred at all. There are in this will, in the first place, certain specific gifts, then a gift of legacies generally, and then follow these words: "I give devise and bequeath all the real and personal estate to which at my death I shall be beneficially entitled, or of which at my death I shall have any general power to dispose beneficially by my will." I am disposed to think that if it had stopped there—that is to say, if the name of the legatee and devisee had followed immediately upon that, that would have been quite sufficient, because it would have been a gift of all the rest of his estate—a good residuary gift of the mixed property all blended into one mass; and I think that, according to the principle of *Greville* v. *Browne*, that must mean that the residuary legatee and devisee is only to take what is left after payment of the pecuniary legacies; and that I consider to be also in accordance with the judgment of Lord *Kingsdown* in that case, where he says that the rule of law is founded in perfect good sense and justice, and shews that it is entirely consonant to the general convenience and what may fairly be considered to be the general intention of testators. But I need not really go so far as that, because I have

(1) 16 Ch. D. 322, 329. (2) 7 H. L. C. 689.

been referred to the case of *Hassel* v. *Hassel* (1), where I find words substantially the same with those which I find here. There the words were, "I give devise and bequeath all and singular my real and personal estate not herein disposed." I cannot really distinguish in effect between that gift and the one before me. Mr. *Upjohn* pointed out that there were special circumstances in *Hassel* v. *Hassel* which might distinguish it from the present case, and that Lord *Bathurst* did not give any reason for his judgment—that is to say, that his judgment is not reported at length. But all that is put out of sight by the way in which *Hassel* v. *Hassel* was dealt with in the two cases which have been referred to of *Mirehouse* v. *Scaife* (2), before Lord *Cottenham*, and *Smith* v. *Butler* (3), before Lord *St. Leonards* in *Ireland*. In each case, according to the report, *Hassel* v. *Hassel* was referred to, not merely by name, but by reference to the volume in which it is reported, and in each case the Lord Chancellor speaks of *Hassel* v. *Hassel* as a gift of "residue." It was in fact a gift of residue, and on that ground I understand each of those two Lord Chancellors takes it as a case brought within what we now call the rule of *Greville* v. *Browne* (4). Lord *St. Leonards* particularly puts it thus (5): "The testator, by his will, first gave legacies, afterwards he gave the residue of his estate not before disposed of; and that latter gift, including real estate, shewed that he considered that his previous gifts in effect, included real estate which was part of the subject-matter of the residuary devise; and therefore it was held that, by implication, the legacies were charged on the lands"; and the Lord Chancellor *Cottenham* says very much the same thing. There one of two things seems to me to follow: either the Lord Chancellor meant that the gift was equivalent to a gift of residue, and that therefore, there being the blended mass, the principle was to be applied whether the word residue was there or not, or he may have merely meant that, as the gift was in substance a gift of residue, it was not improper for him to introduce that word, because the word itself was unimportant. In either way there is a thorough approval of *Hassel* v. *Hassel*, and that case

(1) 2 Dick. 527.
(2) 2 My. & Cr. 707.
(3) 1 J. & Lat. 692.
(4) 7 H. L. C. 689.
(5) 1 J. & Lat. 695.

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carries me all the length which it is necessary for me to go in this case. I therefore think that this application must succeed, and that these legacies must be treated as charged on the residuary real estate.

C. C. M. D.

1893. Dec. 19. The Chief Clerk had, by his certificate, certified the value of the residuary real estate; also—inasmuch as the personal estate not specifically bequeathed would not be sufficient for the payment of the debts and the costs of the action—the values which ought to be set upon the real estates specifically devised and the specific bequests, and the proportions in which the specific devisees and specific legatees respectively ought to contribute to the debts and costs. The further questions were accordingly argued, whether the residuary real estate ought to contribute to the payment of the debts and costs rateably with the specific legatees and devisees; and if so, whether in proportion to its full value or in proportion to its value less the pecuniary legacies charged upon it under his Lordship's decision above reported; and whether the pecuniary legacies were also liable to contribute.

*Renshaw*, Q.C., and *A. Whitaker*, for the legatee, *Cecilia Bryan*:—

For the purpose of measuring the contribution to be made by the residuary devisee to the payment of debts, the residuary real estate must be valued as if it had not been charged with the legacies, and the amount so ascertained must be borne by the residuary devisee, the pecuniary legatees contributing nothing: *Raikes* v. *Boulton* (1); *In re Saunders-Davies* (2), where Mr. Justice *North* delivered a considered judgment to this effect in the case of portions charged on land.

*Upjohn*, for the Defendant, the executor and residuary devisee and legatee:—

The authorities relied on relate to portions charged on real estate, and are therefore distinguishable. The pecuniary legatees

(1) 29 Beav. 41. (2) 34 Ch. D. 482.

ought to bear their proportion of the contribution according to *Long* v. *Short* (1) and *Jackson* v. *Hamilton* (2).

*Warmington*, Q.C., and *Stokes*, for the Plaintiff *Ellen Bawden*.

*Whitaker*, in reply.

KEKEWICH, J.:—

According to the construction which I have placed upon this will, these several pecuniary legacies are charged upon the residuary real estate; that is to say, they are charged in aid of the personal estate which, in course of administration, is the first fund for payment of these pecuniary legacies. The result, of course, will be that the residuary devisee (the personal estate being insufficient) will take, not the residuary real estate clear, but charged with the amount of the legacies, or some portion of it. The residuary devisee says, at any rate with some plausibility, that he does not get what the testator gave him, but something less, and that his contribution to the personal estate, so far as it is insufficient to pay, must be measured, not by what the value of the estate would be independently of the charges, but by the clear bounty which falls to him, that is, the residuary real estate less the charges. That is the principle of *Long* v. *Short*. Mr. *Upjohn* cited an Irish case of *Jackson* v. *Hamilton* (3), in which Lord Chancellor *Brady* followed the principle of *Long* v. *Short*, irrespective of the actual decision in the case, and Lord Chancellor *Sugden* also appears, on a previous hearing of the same case (4), to have approved of *Long* v. *Short*. There is much to be said in favour of that view of the principle and of the authorities; but I am placed in this difficulty, that some six years ago this very point was considered by Mr. Justice *North* and dealt with by him in a reserved judgment, in which he discussed all the cases at length, and deliberately refused to apply *Long* v. *Short* to such a case as I have here. To my mind it would be most unsatisfactory for me to depart in any way

(1) 1 P. Wms. 403.
(2) 3 J. & Lat. 702; 9 Ir. Eq. Rep. 430, 650.
(3) 9 Ir. Eq. Rep. 430.
(4) Ibid. 430, 434; 3 J. & Lat. 702.

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from Mr. Justice *North's* decision. It is six years old, was a considered judgment, and, so far as I am aware, has not been departed from by any other Judge or treated as an unsatisfactory authority. During the argument I referred to the valuable work of Mr. Justice *Vaughan Williams* on Executors. He does mention *In re Saunders-Davies* (1), and, in a note (2), treats it as inconsistent with *Long* v. *Short* (3). Supposing it is, ought I now to go back to the earlier decisions, or accept rather the deliberate judgment of Mr. Justice *North*? It seems to me that, according to the principle which governs the decisions of Judges, and the great importance of making the law certain, I ought to follow the decision of Mr. Justice *North* rather than apply the earlier cases; and I do so the more readily because Mr. Justice *North* followed *Raikes* v. *Boulton* (4), which was decided by Lord *Romilly* in 1860. I do not see anywhere any comments on *Raikes* v. *Boulton*. It is classed with *Long* v. *Short* in Mr. Justice *Vaughan Williams'* note (5), but counsel has not called my attention to any criticism of the Master of the Rolls' decision; and my own notes to the case in *Beavan's* Reports do not indicate that it is cited in any other case but *In re Saunders-Davies*. Therefore, I have nothing to help me. In the report of *Raikes* v. *Boulton* (6) the form of order is given. That was a case of a legacy of £10,000 given by the testator to his younger son: it really was a portion. Trustees were to raise by means of the execution of the trusts of a term, £10,000 for the testator's younger son. Therefore, that was only a way of raising portions charged on real estate by the trusts of a term; and the Master of the Rolls made a declaration that the £10,000 charged by the will was "to be raised free from all costs and deductions, and that the devised real estates of the testator and the specific legacies bequeathed by the will ought to contribute rateably to the deficiency of the personal estate of the testator, not specifically bequeathed, for payment of his debts." That declaration embodies the principle on which the Court proceeded, and the manner in which it was to be worked out. I should gather from

(1) 34 Ch. D. 482.
(2) 9th Ed. pp. 1564–5.
(3) 1 P. Wms. 403.
(4) 29 Beav. 41.
(5) 9th Ed. p. 1589.
(6) 29 Beav. 43.

that declaration that the portioner was not to contribute anything; but I have sent for the order (Reg. Lib. 1860, B., fol. 1555), from which I find that the declaration is followed by an order for an inquiry, "What is the value of the said devised real estates free from any charges or incumbrances created by the said will and of the said specific legacies respectively, and what the specific legacies, or any of them, have contributed towards the aforesaid deficiency." So that there is no question there as to the £10,000. It is clear that the £10,000 was not to contribute, but that the devisees of the estate, subject to the term, were to contribute according to the value of the estate as if the £10,000 had not been charged. I see that Mr. Justice *North*, in the case before him, takes precisely the same view of that decision, and follows it. Then, at the very end of his judgment, he says (1): "As between the real estate and the specifically bequeathed personalty the real estate must contribute in proportion to its value as found by the certificate, without any deduction in respect of the portions."

Then Mr. *Upjohn*, in his able argument, says that there is all the difference in the world between portioners and pecuniary legatees. He says: "These are pecuniary legatees, and they are in a different position, and against them I have a stronger case than against portioners." His explanation does not satisfy me that there is any substantial distinction. I cannot see any difference between this case and *Raikes* v. *Boulton* (2). There the freehold estate was devised to the eldest son for life, and so on. In *In re Saunders-Davies* the persons taking under the limitations were different, but the real estate was given substantially in the same language. There was a slight difference in the conveyancing forms, but the result was, in form, substantially the same. Now, adopting the construction which I have placed upon this will, what have we here? A bequest of pecuniary legacies, which are therefore payable out of the personal estate, with a charge of these legacies on the real estate in aid of the personal estate. What difference can it make whether they are charged in the first instance on the real estate, or whether they are charged in aid of the personal estate? Again, what

(1) 34 Ch. D. 482, 495. (2) 29 Beav. 41.

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difference can it make whether they are payable in the first instance out of the personal estate? The effect of my judgment on the previous point is to put this will on the same footing as a will containing a direction to pay out of the real estate such sums, if any, as are necessary to pay the legacies, and a gift, subject thereto, to the residuary devisee. Whether there is the intervention of trustees, or whether the legacies are to be raised by legal use, seems to me to be quite immaterial. There is, in effect, a gift of the real estate subject to the legacies. They are charged on the real estate. I cannot see any substantial distinction between this case and that decided by Mr. Justice *North*, or that decided by Lord *Romilly*; and, therefore, I must decline to go on to consider the interesting question whether, if those two cases were out of the way, I should follow the decision in *Long* v. *Short* (1).

I must hold, on the authority of those two cases, that, the pecuniary legacies being charged on the real estate, the legatees take their legacies out of the real estate, without any liability to contribute to the debts, and that the residuary devisee takes subject to those charges; and that, notwithstanding that, he must contribute to the payment of the debts rateably with the specific legatees and devisees; and, in ascertaining his rateable proportion, the value of his real estate must be measured, not by the value less the legacies to be paid thereout, but by the value of it independently of those legacies.

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The following were the material parts of the order:—

After ordering the Chief Clerk's certificate to be varied, and declaring that the pecuniary legacies were charged upon the testator's residuary real estate; and directing taxation of the costs of the Plaintiff and Defendant, and of the applicant *Cecilia Bryan*, the order proceeded as follows: "And it appearing by the Chief Clerk's said certificate that the testator's personal estate not specifically bequeathed will not be sufficient for the payment of his debts and funeral expenses and the costs of this action: This Court doth declare that, for the purpose of providing for the payment of the testator's debts already proved or allowed, or hereafter to be proved or allowed, and of the costs of this action, the real estate devised by the testator's will and codicils, and the specific

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(1) 1 P. Wms. 403.

bequests therein contained, and in the said certificate respectively mentioned, ought to contribute to such payment in the proportions in the said certificate mentioned, without making any deduction from the value of the testator's residuary real estate in respect of the said preliminary legacies charged thereon as aforesaid." And any pecuniary legatee was to be at liberty to apply in Chambers as to raising and paying his or her legacy by sale or mortgage of the testator's residuary real estate.

Solicitors for Plaintiff: *Sismey & Sismey.*

Solicitors for Defendant: *Reed & Reed.*

Solicitor for Applicant: *W. W. Comins*, agent for *H. N. Bryan, Hindley.*

G. I. F. C.

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## *In re* PARKER'S TRUSTS.



[1893 P. 0103.]

*Trustee—Appointment of New Trustees—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—"*Personal Representatives*" *of Surviving Trustee—Appointment of Special and General Executors by Will of Surviving Trustee—Probate granted to "general" Executors.*

Sect. 31 of the *Conveyancing and Law of Property Act*, 1881, does not enable a sole surviving trustee of a will to appoint by his will, in continuation to himself, trustees of the will of the original testator.

The sole surviving trustee of a will by his will appointed general executors, and also purported to appoint special executors, for the purpose of executing, in continuation to himself, the trusts of the will of the original testator. The general executors obtained a grant of probate of the will of the trustee to themselves as "general executors," without any reservation of power to the special executors to come in and prove, and proceeded by deed to appoint two persons to be trustees of the will of the original testator. Subsequently probate of the will of the trustee, limited to the trust estates of the original testator, was granted to the persons named as special executors:—

*Held*, that the will of the trustee did not operate as an exercise of the power of appointing new trustees conferred by sect. 31 of the *Conveyancing and Law of Property Act*, 1881; but that as the general executors were, at the time when the deed of appointment was executed, in possession of a general grant of probate, which was the only probate then in existence, they were "personal representatives" of a last surviving trustee within the meaning of the section, and therefore the deed was a valid appointment of trustees.

## PETITION.

*Cornelius Parker*, who died in 1879, by his will, dated the 11th

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of August, 1876, appointed *John Bartholomew Parker* and *J. H. Bell* executors and trustees thereof, and bequeathed to them his residuary personal estate upon certain trusts, and declared that any statutory power or powers of appointing new trustees which should for the time being be in force should be applicable to his will.

*J. H. Bell* died in 1881, leaving *John Bartholomew Parker* surviving.

*John Bartholomew Parker* (who was also the sole surviving trustee of the will of one *Lysimachus Parker*) made his will, dated the 7th of January, 1885, and thereby appointed *R. Benyon* and *W. G. Mount* general executors thereof, and appointed the Rev. *John Parker* and *T. Melson Parker* executors of that his will "for the purpose of executing in continuation to" himself the trusts of the wills of *Lysimachus Parker* and *Cornelius Parker*.

*John Bartholomew Parker* died in 1892, and at his death there was standing in his name a sum of £5750 Consols, representing part of the residuary estate of *Cornelius Parker*.

On the 10th of December, 1892, *R. Benyon* and *W. G. Mount* obtained probate of the will of *John Bartholomew Parker*. The terms of the grant as extracted from the Registry were, that "administration of the personal estate of the said deceased was granted to *Richard Benyon*, Esquire, and *William George Mount*, Esquire, the general executors named in the said will, they having been first sworn well and faithfully to administer the same." The probate contained no reservation of power to the Rev. *John Parker* and *T. Melson Parker* to come in and prove.

By a deed dated the 17th of April, 1893, *R. Benyon* and *W. G. Mount*, in exercise of the power conferred by sect. 31 of the *Conveyancing and Law of Property Act*, 1881, appointed *J. F. Wright* and the Rev. *John Parker* to be trustees of the will of *Cornelius Parker*.

On the 10th of May, 1893, probate of the will of *John Bartholomew Parker*, limited to the trust estates of *Cornelius Parker*, was granted to *T. Melson Parker*. The terms of the grant were, that "administration of the personal estate of the

said deceased was granted to *Thomas Melson Parker*, one of the executors named in the said will as aforesaid, for the purpose only of executing in continuation to the said testator the trusts of the said wills of the said *Lysimachus Parker* and *Cornelius Parker* respectively, which vested in him, the said *John Bartholomew Parker* deceased, at the time of his decease but no further or otherwise, he, the said *Thomas Melson Parker*, having been first sworn well and faithfully to administer the same." A grant substantially similar in terms was subsequently made to the Rev. *John Parker*. These grants did not in any way purport to revoke the grant of the 10th of December, 1892.

*R. Benyon* and *W. G. Mount* served on *T. Melson Parker* a request in writing, pursuant to sect. 24 of the *Trustee Act*, 1850, to concur with them in transferring the Consols to *J. F. Wright* and the Rev. *John Parker* as trustees of the will of *Cornelius Parker*. *T. Melson Parker* did not comply with the request, and thereupon this petition was presented by *R. Benyon, W. G. Mount, J. F. Wright*, and the Rev. *John Parker*, asking for an order vesting in the Petitioners *J. F. Wright* and the Rev. *John Parker* the right to call for a transfer of the £5750 Consols.

The petition came on to be heard on the 1st of July, 1893, when two questions were argued, first, whether or not the will of *John Bartholomew Parker* was a valid appointment of the Rev. *John Parker* and *T. Melson Parker* to be new trustees of the will of *Cornelius Parker*, and secondly, assuming that the first-mentioned will was not a valid appointment, then whether or not the deed of April, 1893, was a valid appointment of new trustees of the will of *Cornelius Parker*. Mr. Justice *Kekewich* gave judgment deciding the first question in the negative, and the second in the affirmative.

After the judgment had been delivered, his Lordship received information respecting the practice of the Probate Division, which suggested a doubt whether his decision upon the second question was founded on sufficient materials; and on the 11th of January, 1894, the case came on again to be re-argued on that point only. The petition, in the meantime, was amended by stating more fully the several grants of probate.

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*Renshaw*, Q.C., *Bargrave Deane*, and *J. G. Wood*, for the Petitioners:—

The will of the testator *John Bartholomew Parker* was not a valid appointment of the special executors to be trustees of the will of *Cornelius Parker* within the meaning of sect. 31 of the *Conveyancing and Law of Property Act*, 1881, for that section manifestly contemplates an appointment in writing taking effect during the lifetime of the surviving or continuing trustee who makes the appointment.

The sole question therefore is, whether at the date of the deed of appointment the general executors were the "personal representatives" of *John Bartholomew Parker* within the meaning of sect. 31 of the *Conveyancing Act*, 1881, and as such competent to appoint new trustees of the will of *Cornelius Parker*. We contend that they and they only were such personal representatives.

The effect of the general grant of probate to the "general" executors was to constitute them the legal personal representatives of the testator. For the present purpose, "general" executors simply means executors. The word "general" cannot have been used by way of limitation; it was introduced merely because there were other persons who were not general, but limited or special executors; and it points to the distinction between those who are general executors in the sense of "universal" executors, and who represent in law the *persona* of the deceased, and those who are only appointed executors for a special or limited purpose. If a man appoints *A.* his general executor, *B.* his executor for *Ireland*, and *C.* his executor for *France*, *A.* has a universal and general jurisdiction over the whole property of the deceased.

[KEKEWICH, J.—Supposing the special executors had first obtained a grant, what would have been the nature of the subsequent grant to the general executors?]

It would have been a general or original and not a *cæterorum* grant. A *cæterorum* grant, which is a grant of administration and not of probate, is in respect of property which could not have been dealt with by the persons originally appointed, as in

the case of a married woman making a will in execution of a power, where a *cæterorum* grant is made of property not disposed of by the will.

The attempted appointment by *John Bartholomew Parker* of two persons to be special executors of his will for the purpose of executing in continuation to himself the trusts of the will of *Cornelius Parker* was altogether inoperative, and the grants made to the special executors were consequently void, and of no effect. It is not disputed that a man may appoint limited or special executors to particular parts of his own property; but he has no right to appoint by his will either a trustee or an executor of the property or will of some one else. *John Bartholomew Parker* did not appoint these special executors to be executors of his will: no property of his passed to them, and they were not his personal representatives in any sense within the meaning of sect. 31. It is true that he has called them "executors of this my will"; but that is explained by the subsequent language, which shews that in truth they were intended to act as executors of the will of *Cornelius Parker*. The special grants, therefore, were really to them as trustees, and not as executors; and the case of *In re Burtt's Estate* (1) (although the particular point there raised could not arise now that a testator has no power to devise or bequeath trust estates) is an authority to shew that a man cannot appoint an executor so as to invest him with the character of trustee of the property of a third person.

But there is a further reason why these special grants must be treated as of no effect. They were made as of course, the parties interested were not cited, and the granting of a probate in such a way is a mere ministerial act of the officers of the Court, and, as regards the interests of beneficiaries and parties not cited, is a mere nullity. The case is analogous to that of a married woman already referred to. Before the *Judicature Act*, if a married woman made a will in execution of a power, the practice of the Probate Court was to grant probate limited to the property over which she had a power, whether the power was well executed or not, and the question as to the effect of the will as an

(1) 1 Drew. 319.

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appointment was always left for the Court of Construction: see *De Chatelain* v. *De Pontigny* (1), following *Barnes* v. *Vincent* (2), as shewing that the Court of Probate had no authority to inquire as to the due execution of the power, whether the supposed imperfection consisted of the want of witnesses, or of any other formality required by the power. But since the *Judicature Act* the law is, that if all parties are before the Court in a properly-constituted suit the Court can decide as to the effect of the appointment: see *In the Goods of Tharp* (3), where the cases are examined by *Jessel*, M.R. The judgment of *Bramwell*, L.J., in that case shews clearly that unless the matter is properly presented to the Court on the pleadings in an action to try the effect of the probate, the granting of the probate is purely an official act. So in the present case the Registrar has merely decided that on the face of the will there is an appointment of special executors. If a *caveat* had been lodged, the persons interested would have been warned, and then there would have been litigation before the Court as to whether probate ought to be granted, and there can be no doubt that these special grants would not have been made if the matter had been so considered. The beneficiaries under *Cornelius Parker's* will could, if they had liked, have applied for revocation of the special probates; but as those probates were nullities, it was not necessary to do so.

Sect. 31 of the *Conveyancing Act*, 1881, must be read together with sect. 30, whereby lands held on trust or by way of mortgage devolve, like chattels real, on the personal representatives. The question must be whether real or personal estate held upon trust would in a case like the present vest in the two general executors, or in the two special executors, or in all four. It is submitted that the trust estate must vest in the two general executors only. Under sect. 30 the estate is to devolve by operation of law and force of the statute, and not by force of the words in the will; but if a testator might, by making a limited executorship, take trust estates from his general representatives, he would in effect be making a testamentary disposition in contravention of the words of the statute. "Personal representatives" in

(1) 1 Sw. & Tr. 411. (2) 5 Moo. P. C. 201.
(3) 3 P. D. 76.

sect. 30 cannot mean persons appointed to execute trusts, but persons who represent the estate of the trustee, and are his executors or administrators.

If these special executors could act as trustees, they would in effect be acting as representatives of *Cornelius Parker*, and not of *John Bartholomew Parker*, and it is the representatives of the latter, and not of the former, who are the persons to appoint trustees.

*Warmington*, Q.C., *W. T. Barnard* and *Macnaghten* for the Respondent:—

First, we submit that the will of *John Bartholomew Parker* was a good appointment in writing, by the last surviving trustee for the time being of the will of *Cornelius Parker*, of new trustees of that will within the meaning of sect. 31 of the *Conveyancing Act*. There is nothing in the language of the section to exclude such an appointment. The last surviving trustee may appoint by his will, and, if he does not, then his personal representatives may do so.

If, however, we are wrong on the first point, then we submit that the deed of appointment of April, 1893, was inoperative, as no valid appointment of trustees could be made without the concurrence of the persons named as special executors in the will of *John Bartholomew Parker*.

It is competent to a man to appoint an executor of any particular property. He can appoint a general in the sense of universal executor, and an executor limited to certain parts of his property. The effect is that the general executor is the sole representative as to the general property. As to the rest of the property, the legal personal representatives are the general and special executors together. So, also, a man can appoint an executor of all his estate, other than a particular part, and then an executor of that particular part. The first named executor would frequently be called the general executor; but in truth, he would be a limited or special executor, though in a larger sense than the other executor. It is clear from *Lynch* v. *Bellew* (1), that in such a case probate must go to both executors—

(1) 3 Phillim. 424.

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general probate to the person appointed as general executor, and a limited probate to the special executor. As to the property which is the subject of the limited grant, the two, and not one only, are the executors. A creditor seeking to obtain an administration judgment must make both of them parties to his action. If he sued only the general executor, he would not get administration of the property comprised in the limited grant: see *Williams* on Executors (1), where it is stated that "although a testator may thus appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors, they are all executors, and as one executor, and may be sued as one executor."

No authority has been cited to shew that the power of a man to appoint special executors is confined to property of his own, *i.e.*, of which he is the absolute owner; on the contrary, in *Tristram* and *Coote's* Probate Practice (2) it is said that, "If a testator appoint an executor for the purpose of administering the estate of another testator, whose sole or surviving executor he himself was, probate is granted to him limited for such purposes." That is the exact point stated in a work of recognised authority.

If convenience or inconvenience is to enter into the question it is clearly convenient to allow a man to appoint a special executor for the purpose of carrying on a trust, and leave his wife to manage his own property, without hampering her with the execution of the trust. In reference to the question put by the Court as to what would have happened if the limited grant had been made first, reference may be made to *Tristram* and *Coote* (3), where it is stated that "The probate or administration following upon a limited grant, is *cæterorum*; and, except that it follows, instead of preceding such a grant, it is, as I have intimated, made for the same purposes, and under the same conditions, as the grant 'save and except.'"

The title of the executor does not in the least depend on the grant. If the limitation were of particular property, *e.g.*, leaseholds, no conveyancer would accept the title under the will from the general executor without ascertaining whether the

(1) 9th Ed. p. 202. (2) 11th Ed. p. 151.
(3) 11th Ed. p. 171.

persons appointed special executors for the leaseholds had or had not renounced.

The grant to the general executors was really a grant "save and except" the trust property given to the special executors. The word "general" gives notice to every one that the executors so described are not executors in the full sense of the word, *i.e.*, universal executors, and that to ascertain the effect of the probate, reference must be made to the appointment of executors contained in the will.

Sect. 31 of the *Conveyancing Act* must be read together with sect. 30, but with the knowledge of the power which a testator has to appoint more than one set of legal personal representatives. The intention of sect. 30 is, to put real estate of which a trustee is seised on the same footing as personal estate, and, so far from limiting the power of a trustee or of an executor as to appointing special executors, it rather extends the power, inasmuch as a man may now appoint a legal personal representative in respect of real estate. If in sect. 31 the expression "personal representatives of the last surviving or continuing trustee" must mean the persons who for the time being are in possession of a grant of administration, whether by probate or letters of administration, our argument no doubt would fail; but the section says nothing about probate at all, and it is old law that an executor does not derive his title from the probate, but from the will—see *Williams* on Executors (1)—"as the interest of an executor in the estate of the deceased is derived exclusively from the will, so it vests in the executor from the moment of the testator's death." Probate in this Court is only evidence; it is not title.

It is every-day practice that an executor who has not taken out probate can make a good title to property, can sell chattels of his testator, and release a debt. There is no doubt of his right, as soon as the testator is dead, to take possession of the goods of the deceased, and to sue in trespass if any one who has not been appointed executor retains possession of them.

For the present purpose there is no distinction between legal personal representative and executor. "Legal personal repre-

(1) 9th Ed. p. 551.

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sentatives" is not a technical expression in law, but one invented by lawyers in modern times to include two classes of persons who represent the deceased man.

The question, then, is whether *J. F. Wright* and *J. Parker* were executors of *John Bartholomew Parker*, so far as concerned the personal estate which at his death he possessed as trustee under the will of *Cornelius Parker:* It is impossible to say that they were. We are not concerned here to argue that the special executors alone are the persons to exercise the power of appointing new trustees. As to that, a distinction might have to be drawn between general executors in the sense of universal executors, and general executors with an exception of property over which special executors are appointed. It is sufficient for us to say that in this case, without the concurrence of the special executors, no valid appointment could be made.

*Renshaw*, in reply:—

As to the invalidity of the special grants, reference may be made to *In the Goods of Currey* (1), where Sir *H. J. Fust* disapproved the practice of making limited grants without the citation of the next of kin.

The real point is whether the appointment of new trustees was good without the concurrence of the special executors. We submit that *John Bartholomew Parker* could not delegate the statutory power of appointing new trustees, which was vested in him as last surviving trustee, and, after his death, in his personal representatives. The very language of the limited grants is incorrect. They state that administration of the personal estate of the deceased was thereby granted. That was not true. No personal estate of the deceased whatsoever passed to the special executors. The grants ought to have been limited to such personal estate as was vested in the deceased as trustee of the will of *Cornelius Parker*.

*Lynch* v. *Bellew* (2) is an authority in our favour. It shews that the power of the special executors is limited to the particular property, but there is nothing in it which qualifies the power of the general executors.

(1) 5 Notes of Cases, 54. (2) 3 Phillim. 424.

No authority is cited in support of the proposition in *Tristram* and *Coote* (1), and it is submitted that that proposition is not well founded, if it is intended to intimate that a testator can appoint a person other than his own executor to be executor in succession to himself. The whole law as to the chain of representation is founded, as is said in *Williams* on Executors (2), "upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and as long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator." But the confidence is that which a man reposes in the person to whom after his decease he is content to entrust the management of his own affairs, and no such confidence is shewn by his appointment of a person to manage the affairs of some one else.

No doubt an executor may do acts before probate; but if such acts are relied on as matter of title, a subsequent probate must be produced in order to shew the executor's right to do the acts: *Williams* on Executors (3).

The intention of the Legislature in passing sect. 30 of the *Conveyancing Act*, 1881, which was substituted for sect. 4 of the *Vendor and Purchaser Act*, 1874, evidently was to make the estate of the trustee in realty and personalty follow the devolution of the trust, and thus do away with such questions as arose in *Lord Braybroke* v. *Inskip* (4) and *Cooke* v. *Crawford* (5), by clothing the executor with the legal estate and excluding the heir: *In re Pilling's Trusts* (6).

By sect. 4 of the *Conveyancing Act*, where a deceased person has contracted to sell a freehold interest in land, the power to convey is conferred on his "personal representative"; and sect. 42, sub-sect. 5, provides for the accumulations of income of an infant's land being held in trust in case of his death for his "personal representatives as part of the infant's personal estate." In both those sections "personal representatives" evidently means

(1) 11th Ed. p. 151.
(2) 9th Ed. p. 204.
(3) Ibid. p. 251.
(4) 8 Ves. 416.
(5) 13 Sim. 91.
(6) 26 Ch. D. 432.

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those who represent the deceased as regards his personal estate. On the other hand, in sects. 36 and 37 giving powers to compound and compromise, and making powers exerciseable by the survivor of two executors or trustees, the word "executor" is used, and not "personal representative."

There would be great inconvenience in holding that "personal representatives" in sects. 30 and 31 of the *Conveyancing Act*, 1881, refers to and includes all persons who may be entitled to a grant of probate as special executors of any part of the testator's estate. That would include special executors appointed for property abroad, who might be resident abroad, and whom it might be extremely difficult to find. That difficulty is obviated if it is held that "personal representatives" means those who appear to be such by the official document under the seal of the Probate Division.

*Macnaghten*, in reply on the cases cited, referred to *Cole* v. *Wade* (1) and *Sugden* on Powers (2).

Jan. 26. KEKEWICH, J.:—

After my judgment had been delivered in July last, there was given to me, and by me communicated to counsel, some information respecting the practice of the Probate Division, which suggested a doubt whether my conclusions were not, as regards one point, the outcome of insufficient materials. The result was the re-argument of that point, after which I reserved judgment.

On the original hearing two points were argued, and as the decision on one of them was not affected by the practice of the Probate Division, it was not made the subject of re-argument. It will nevertheless be convenient for me now to repeat what was then decided and why.

The testator, *John Bartholomew Parker*, was the sole surviving trustee of the will of *Cornelius Parker*. He appointed two general executors, and, in addition, two special executors, "for the purpose of executing in continuation to" himself "the trusts of the wills of *Lysimachus Parker*" (who may be left out of sight) "and *Cornelius Parker*." The question is whether the appoint-

(1) 16 Ves. 27. (2) 8th Ed. p. 132.

ment of these special executors was an exercise of the power conferred on him by the 31st section of the *Conveyancing and Law of Property Act*, 1881. That power of appointment is primarily given to the "surviving or continuing trustees or trustee for the time being," and it was therefore given to him. In the alternative it is given to the personal representatives of the last surviving or continuing trustee. The appointment is to be made by writing, and the power is to "appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the *United Kingdom*, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid." That language seems to me to be inapplicable to an appointment by the last surviving trustee in the place of himself, and to take effect at his own death. An appointment operating in that event is not suggested by the language, and although there might be considerable convenience in so construing it, I do not think it would be a fair construction of the Act to hold that the writing points to or includes a will appointing a trustee in the place of the man who makes the will.

The other question is closely connected with the former one; but it is entirely different, and it is whether an appointment of new trustees of the will of *Cornelius Parker*, made by the two general executors of *John Bartholomew Parker*, when they had proved his will, but the two special executors had not, is good, or whether, by reason of their want of authority, some further appointment is now necessary. The two general executors seeking to prove the will, probate was granted to them by that description thus: "Administration of the personal estate of the said deceased was granted to *Richard Benyon*, Esq., and *William George Mount*, Esq., the general executors named in the said will, they having been first sworn to well and faithfully administer the same." I am unfortunately without an authoritative statement respecting the practice of the Probate Division in such cases, or the reasons governing it; but it is stated by gentlemen competent to speak, and their statements are confirmed by Mr. *Coote's* book (which in its later as well as in its earlier editions is well known as a trustworthy guide to practitioners), that the grant to general executors implies that there are other

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executors of a special character to whom a limited grant has been or may be made. This is not precisely stated in Mr. *Coote's* book, because he does not contemplate the actual event which has occurred here; but I hold it to be a fair inference from the rules given by him. The result is that "general" must not be regarded as meaning "universal," or rather it must be regarded as implying that there is or may be another executor who is not general. When first *Thomas Melson Parker*, and secondly *John Parker*, subsequently applied for probate, special grants were made to them in forms (for they do not precisely agree) somewhat embarrassing. It is not my office to criticize the forms of the Probate Division, and I have no wish to undertake it. It seems to have been thought convenient and right to adapt the words of the will, as far as possible, to the common forms of grant, and accordingly these gentlemen were treated as executors "for the purpose only of executing in continuation to the testator the trusts of the will of *Cornelius Parker* which vested in *John Bartholomew Parker* at the time of his decease, and" they were sworn "well and faithfully to administer the same." I am at a loss to know what they were to administer. The only antecedent to which "the same" can refer is the trusts of the will of *Cornelius Parker*, and yet I can scarcely conceive that the Probate Division intended to control the administration of those trusts which would not fall within its ordinary jurisdiction. I ought, however, to attribute to these grants whatever effect in substance, irrespective of form, may be fairly attributed to them, and it seems to me that they must have operated as evidential confirmation of the appointment by *John Bartholomew Parker* of executors of that part of his estate which he held as trustee of the will of *Cornelius Parker*. It has long been settled that a man may appoint different executors for different parts of his estate, and the rule must, I think, hold good, notwithstanding that some parts of that estate are his own property and others belong to him as trustee. When this occurs, each executor takes by virtue of his appointment, of which the grant of probate is the conclusive and only evidence, that personal estate to which his appointment refers, and becomes the legal owner thereof; but as regards what belonged to the testator as trustee, such ownership

does not make the executor trustee in the testator's stead: see *In re Burtt's Estate* (1).

This, however, does not dispose of the question which falls for decision here. The power of appointing new trustees is given by the 31st section of the *Conveyancing and Law of Property Act*, 1881, to the personal representatives of the last "surviving or continuing trustee," and the question is whether the special executors were the personal representatives of *John Bartholomew Parker* within the meaning of the Act for the purpose of making the appointment. Even that is not the only question, because it has been further argued that, if they were not competent to make the appointment, yet the general executors could not make it—that is, were not personal representatives of the testator within the meaning of the Act, and therefore their appointment is bad. It is to be observed that the Act says the personal representatives, and not executors or administrators, of the last surviving trustee, and to my mind the distinction is all-important. Passing by administrators, who have no office and no authority until administration has been granted to them, it might be that executors would have included all named by the testator, notwithstanding they had not proved the will, unless of course they had formally renounced probate. There would be manifest inconvenience in vesting the power of appointment in persons about whom there is a doubt whether they will prove or not, and who in the meantime may be inaccessible, and I cannot but think that those who can for the time being produce the only evidence of office and authority were intended by the Legislature to be the personal representatives of the testator for the purpose of appointing his successor as trustee. This testator clearly contemplated a different result. I have no doubt that in using the language which he did use in the appointment of these special executors, he intended that they should themselves succeed him as trustees of the will of *Cornelius Parker*. I have already held that he could not do that so as to make them become trustees by accepting the office of executor. It follows that unless they are really his personal representatives within the meaning of the Act, he has not delegated to them, and could

(1) 1 Drew. 319.

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not delegate to them, the power of appointing new trustees of *Cornelius Parker's* will, and I cannot see my way to holding that, within the meaning of the Act, a man may have one set of personal representatives for one purpose, and a different set for another purpose. This view is strongly confirmed by the 30th section of the same Act. That section was much discussed on the re-argument, and properly so, because it is closely connected with the 31st section, and is, like it, comprised under the heading "trust and mortgage estates on death." The 30th section treats of real estate. It provides that on the death of the sole trustee of real estate it shall devolve to and become vested in his personal representatives or representative. It therefore takes away the power of devising trust estates, and provides a new method of devolution. It is argued, and there is much force in the argument, that if a testator-trustee were allowed to appoint one set of executors of his own estate, and another of estates vested in him as trustee, he really would be devising his trust estates to that second set to the exclusion of those who are for all purposes his personal representatives. But in any event, I think that the term personal representatives ought to receive the same construction under both sections, and that what has been remarked before respecting the language of the 31st equally applies to that of the 30th section. What would have happened if there had been one grant only I forbear to consider. Perhaps if there had been one grant only, it would have been in a form which would have solved or avoided the question. My opinion is, that the two general executors were, at any rate until the grants to the special executors, the personal representatives of *John Bartholomew Parker* within the meaning of the Act, and that therefore they were competent to appoint new trustees of *Cornelius Parker's* will, notwithstanding that *John Bartholomew Parker* had also appointed special executors who might have applied, as in fact they afterwards did apply, for special grants.

There is no occasion for me to say that the case bristles with difficulties, and that I have arrived at the above conclusion after considerable hesitation. It is not often convenient to say that, but it follows from the course of events here.

I propose to make the same order which I proposed to make

on the conclusion of the first hearing, viz., the Court being of opinion that the appointment of trustees by the deed of the 17th of April was good, and the Petitioners undertaking to execute any transfer that may be required in order to vest the stock in the names of the two Petitioners who were appointed trustees by the deed, direct the Respondent to execute a transfer of the stock into the names of such two Petitioners, to be held by them upon the trusts of the will of *Cornelius Parker.*

Solicitors: *Faithfull & Owen; Collyer-Bristow & Co.*

C. C. M. D.

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Dec. 7, 8;
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Jan. 27.

# *In re* TUCKER.
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[1893 T. 168.]

*Trust—Authorized Investment—Loan to a Firm—Change in Firm—Continuation of Loan—Breach of Trust—Payment of Interest by Firm—Liability of Partners—Statute of Limitations—Trustee Act,* 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Bankrupt Trustee—Costs.*

A testator who died in 1870 by his will authorized his trustees to invest his personal estate "either by placing the same on deposit in the hands of the firm of *B., T. & Co.* should they be willing to receive it at interest," but if not, then upon usual securities with liberty "to call in, vary, and transpose investments." At the time of his death the testator had a sum of money on deposit with the firm, which his trustees continued after his death:—

*Held*, that it was a breach of trust to continue the loan after a change took place in the members constituting the firm.

*H. T.* and *W. T.* were the members of the firm when the testator died. *H. T.* died in 1875, and then *W. T.* took over the business and admitted *H. E. T.* as a partner, and they carried it on until December, 1878, when *H. E. T.* retired. From 1878 to 1883, *W. T.*, *S. B. T.*, and *A. T.* carried on the business in co-partnership, when *W. T.* retired; but his retirement was not gazetted. From 1883, *S. B. T.* and *A. T.* carried on the business until 1891, when it was turned into a limited company. From first to last the business was carried on in the name of *B., T. & Co.*, and down to 1891 interest was regularly paid to the testator's estate on the loan by cheques drawn in the name of the firm:—

*Held*, that as against *W. T.* the loan was not statute-barred, for that under the circumstances the payment of interest after his retirement by the continuing partners, must be taken to have been made by them on his behalf and as his agents.

*S. TUCKER*, by his will, dated the 18th of March, 1870, after appointing *M. Howitt* and *J. Kayess* his trustees and executors, empowered and directed his trustees or trustee for the time being to invest his personal estate "either by placing the same on deposit in the hands of the firm of *Baker, Tuckers & Co.*, of No. 20, *Gresham Street*, in the City of *London*, silk warehousemen, should they be willing to receive it at interest; but if not, to invest the said trust moneys upon guaranteed securities, or in the public stocks or funds of the *United Kingdom*, or on mortgage of freehold property in *England*, with liberty to call in,

vary, and transpose the investments from time to time at their or his discretion for any other investment or investments of the description contemplated by this trust." And the testator directed his trustees to stand possessed of the said trust funds upon trust for his wife (the Plaintiff) *Mary Tucker*, for life, and after her death upon trust for his children and their issue as therein mentioned.

*S. Tucker* died in April, 1870, and was, at the date of his will and of his death, in the employment of the firm of *Baker, Tuckers & Co.*, and had on deposit with them the sum of £7485 10*s.* 3*d.* After his death his said trustees, *M. Howitt* and *J. Kayess*, continued the loan to the firm, and subsequently increased it to £8633, which sum represented the net residuary estate of the testator, and was always credited in the ledgers of the firm to "the trustees of *Stephen Tucker*."

At the date of the will and of the death of the testator the firm of *Baker, Tuckers & Co.* consisted of *H. Tucker* and the Defendant *W. Tucker*. *H. Tucker* died in January, 1875, having by his will appointed the Defendant *W. Tucker* and two other persons his trustees and executors; and the Defendants *A. J. Tucker* and *G. H. Dean* were the present trustees of his will.

On the death of *H. Tucker*, the Defendant *W. Tucker* took over the whole assets of the said business, and shortly afterwards admitted *H. E. Tucker* and the Defendant *S. B. Tucker* into partnership with him in the said business as from the 27th of December, 1874, under articles of partnership dated the 7th of July, 1875. In December, 1878, *H. E. Tucker* retired from the business, and thereupon the Defendants *W. Tucker, S. B. Tucker*, and *A. J. Tucker* took over and became partners in the said business as from the 25th of December, 1878, under articles of partnership dated the 21st of March, 1879.

In July, 1881, *M. Howitt* and *J. Kayess* retired from the trusts of the said will of the testator, *S. Tucker*, and by deed appointed the Defendants *S. B. Tucker* and *C. Cannon* to be new trustees of the said will, and transferred to them the £8633 on deposit with the firm of *Baker, Tuckers & Co.*

In the year 1881 *M. Howitt* became bankrupt, and in the year 1893 he died insolvent.

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In April, 1883, the Defendant *W. Tucker* retired from the partnership, and by an agreement dated the 13th of April, 1883, the partnership was dissolved as to the Defendant *W. Tucker* as from the 31st of December, 1882, and it was agreed that the assets and effects of the partnership, including the goodwill, should be taken over by the continuing partners, the Defendants *A. J. Tucker* and *S. B. Tucker*, for their own use, and that they should pay and discharge all the debts and liabilities of the late partnership, and should jointly and severally indemnify the Defendant *W. Tucker* and his estate and effects therefrom. This retirement of the Defendant *W. Tucker* was not advertised in the *London Gazette*, and the business continued to be carried on in the old name of *Baker, Tuckers & Co.*

The said *J. Kayess* died in April, 1884, and the Defendants *W. Tucker* and *S. B. Tucker* were the executors of his will, and the Defendants *W. Kayess, F. Kayess, L. Kayess*, and *A. Kayess* were his residuary legatees.

In 1890 the Defendant *C. Cannon* was adjudicated a bankrupt, and was still undischarged.

In 1891 the Defendants *W. Tucker, S. B. Tucker*, and *A. J. Tucker* turned the business of the firm of *Baker, Tuckers & Co.* into a limited liability company under the name of "*Baker, Tuckers & Co., Limited.*" From the death of the testator *S. Tucker* until the 30th of June, 1891, interest was regularly paid on the £8633 to the Plaintiff *Mary Tucker*, when it ceased. These payments were always made by cheques in the firm name of *Baker, Tuckers & Co.*

This action was commenced in January, 1893, by the testator's widow, the Plaintiff, *Mary Tucker*, and all the other beneficiaries under his will, claiming (1.) administration of the trusts of the will of the testator *S. Tucker*, accounts on the footing of wilful default against the Defendants *S. B. Tucker* and *C. Cannon* and the said *J. Kayess*, deceased, and the removal of the Defendants *S. B. Tucker* and *C. Cannon* from their trusteeship; (2.) a declaration that the Defendant *W. Tucker* was constructively a trustee of the £8633 for the benefit of the Plaintiffs; and (3.) that the Defendants *W. Tucker, S. B. Tucker*, and *C. Cannon*, and the estates of *H. Tucker* and *J. Kayess*, deceased, were jointly

and severally liable to replace the £8633 with interest. This was the trial of the action. The several defences are sufficiently noticed in the arguments.

The Defendant *S. B. Tucker* did not appear.

*Chadwyck Healey*, Q.C., and *W. B. Heath*, for the Plaintiffs:—

We submit that the testator here intended, and the words of his will only authorized, a loan to the firm of *Baker, Tuckers & Co.* as constituted at the date of his death, when the will took effect. Therefore, on the death of *H. Tucker* in 1875, the loan became an unauthorized investment, and *M. Howitt* and *J. Kayess* committed a breach of trust in not calling it in or seeing that it was properly secured: *Lindley* on Partnership (1); *Fowler* v. *Reynal* (2). *H.* and *W. Tucker* were jointly and severally liable for the loan, and we are entitled to go against *H. Tucker's* estate: *Kendall* v. *Hamilton* (3). As to *W. Tucker*, he knew this was trust money, and on the death of *H. Tucker* he became constructively a trustee of it for the Plaintiffs: *Ernest* v. *Croysdill* (4); and the subsequent payments of interest by him or on his behalf in the firm name kept alive the debt, and prevented the *Statute of Limitations* from running as regards him. As to *S. B. Tucker* and *C. Cannon*, although they may not be liable for what occurred before their appointment as trustees in 1884, they are liable for allowing the loan during their trusteeship to remain outstanding and unsecured.

Sir *E. Clarke*, Q.C., *Neville*, Q.C., and *P. F. Stokes*, for the Defendant *W. Tucker*:—

The fact that *W. Tucker* knew the loan was trust money did not constitute him a constructive trustee of it, and the payment of interest after his retirement from the firm in April, 1883, did not keep alive the debt as against him: *Watson* v. *Woodman* (5); *Lindley* on Partnership (6). The payment of interest by the continuing partner, *S. B. Tucker*, must be taken to have been made by him in his character as trustee, and not as agent for or

(1) 5th Ed. p. 113.
(2) 2 De G. & Sm. 749.
(3) 4 App. Cas. 504.
(4) 2 D. F. & J. 175.
(5) Law Rep. 20 Eq. 721.
(6) 6th Ed. p. 271.

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on behalf of the firm or *W. Tucker*. The debt, therefore, is statute-barred, and, at any rate as against the Plaintiff *Mary Tucker*, *W. Tucker* is entitled to the benefit of sect. 8 of the *Trustee Act*, 1888.

*Haldane*, Q.C., and *G. F. Hart*, for the executors and beneficiaries under the will of *J. Kayess*:—

The words of the investment clause in the will are not restricted to the persons constituting the firm of *Baker, Tuckers & Co.* at the death of the testator, but mean the members of the firm for the time being. The firm was solvent during the life of *J. Kayess*, and no loss occurred, nor were there any circumstances to shew any necessity for calling in the money. Therefore his estate is not liable for the subsequent loss, and the *Trustee Act*, 1888, s. 8, applies.

*Oswald*, Q.C., and *W. Fooks*, for the trustees of the will of *H. Tucker*:—

There was no breach of trust during the life of *H. Tucker*. The payment of interest after his death did not keep alive the debt as against his estate, because the payments were not made out of his estate, but out of the assets of the continuing firm: *Thompson* v. *Waithman* (1).

*A. à B. Terrell*, for the Defendant *Cannon*:—

All the loss of the trust fund occurred, and the liability of the Defendant *Cannon* in respect of it arose, before his bankruptcy in August, 1890. It was a debt provable in his bankruptcy, and will be discharged thereby: *In re Basham* (2). He ought not, therefore, to have been made a Defendant in this action, and is entitled to his costs: *In re Vowles* (3). He is ready and willing to retire from his trusteeship.

*Chadwyck Healey*, in reply.

1894. Jan. 27. ROMER, J.:—

Several questions arise in this case. First, as to the alleged liability of *Henry Tucker's* estate. I think that liability cannot

(1) 3 Drew. 628. (2) 23 Ch. D. 195. (3) 32 Ch. D. 243.

now be enforced by reason of the *Statute of Limitations*. The payments of interest by *William Tucker* must be attributed to him in his personal capacity and not in his capacity of executor of *Henry Tucker*: see *Thompson* v. *Waithman* (1). This action must, therefore, be dismissed with costs as against those representing that estate. Only one set of costs will be allowed to those representatives, and, of course, *William Tucker*, as one of them, will only get the costs incurred in his representative capacity. So far, also, as the action sought to establish a claim against *A. J. Tucker* and *G. H. Dean* as trustees of *H. Tucker's* will the action must be dismissed against them with costs. The second question is whether the right to make *William Tucker* liable for the loan from the trustees of the will of the testator *Stephen Tucker* is barred by the *Statute of Limitations*. The facts are shortly these. The loan was to *Henry Tucker* and *William Tucker*, partners in the business of *Baker, Tuckers & Co.* After *Henry Tucker's* death in January, 1875, *William Tucker* continued the business in the old name by himself until July, 1875, and after that date by himself and divers co-partners. As between *William Tucker* and his co-partners, the debt to *Stephen Tucker's* estate was treated as a partnership debt. But so far as concerns the trustees of *Stephen Tucker's* will, *William Tucker* alone remained liable. There was no novation—no new loan to the new firms. Interest was paid on the debt in the name of *Baker, Tuckers & Co.* until *William Tucker* retired from the partnership. That partnership was dissolved by agreement on the 13th of April, 1883, to take effect as from the 31st of December, 1882. So that there is no question of *William Tucker's* liability up to the 13th of April, 1883. By the deed of dissolution between *William Tucker* and his then co-partners, dated the 13th of April, 1883, it was agreed between them that the latter, who were to continue the partnership business, should pay and discharge (*inter alia*) the debt due to *Stephen Tucker's* trustees. Accordingly the continuing partners until June, 1891, paid interest on the debt in the name in which interest had always previously been paid, that is to say, in the name of the firm—*Baker, Tuckers & Co.* If this payment

(1) 3 Drew. 628.

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of interest is to be regarded as a payment by *William Tucker* through his authorized agents, the continuing partners, then it is clear that the recovery of the debt is not barred by the statute. Now, let me first consider the question on principle. If a debtor arranges with a third person that that third person shall pay the debt for and on behalf of the debtor to the creditor, and that third person in pursuance of and in accordance with the arrangement makes payments to the creditor in respect of the debt, how will matters stand? In the first place, if the arrangement between the debtor and the third person is not communicated by them to the creditor, and the third person in pursuance of and in accordance with the arrangement makes the payments in the debtor's name to the creditor, then it is clear that the creditor is entitled to say, as against the debtor, that these payments were the payments of the debtor. To hold otherwise would lead to the most astonishing results. For the creditor, relying on the part payments as preventing the statute running, might nevertheless find his debtor lost to him without the slightest fault or delay on his side. But, now, suppose the arrangement is communicated to the creditor, and the creditor accordingly receives payments from the third person, then, there being no question of novation, it appears to me equally clear that the creditor, having been told to look to the third person for payment on the debtor's behalf and received payment accordingly as for and on behalf of the debtor, is entitled to say, as against the debtor, that those payments are the debtor's payments. Now apply these principles to the present case. It cannot be disputed, and indeed it is contended at the Bar on behalf of *William Tucker*, that the arrangement come to between him and his co-partners by the deed of the 13th of April, 1883, was not one whereby there was to be any novation of the debt by the trustees of *Stephen Tucker's* will, or whereby the trustees were to accept the continuing partners as debtors or to cease to regard *William Tucker* as the debtor. This being so, the arrangement come to by that deed is an arrangement whereby the debtor, *William Tucker*, arranges with third persons—the continuing partners—who were not debtors, that the latter should pay his debt. Seeing that these third persons were not debtors,

for whom and on whose behalf were they to pay the debt? Clearly for and on behalf of *William Tucker*. Now, some complication appears to arise from the fact that one of the continuing partners was one of the then two trustees of *Stephen Tucker's* will. But this fact in my view really does not matter. Either the arrangement is to be treated as communicated to the trustees or not. If the former, then the trustees knew that *William Tucker* had authorized the continuing firm to pay the debt for him and on his behalf. If the latter, then *William Tucker* had, without informing his creditors, authorized third persons to pay for him and in his name. And in either view the trustees are entitled to treat the payments as made by *William Tucker*. And no distinction can be drawn in this case between a payment of or on account of principal or a payment on account of interest. I have not to consider here a case where the authority to the third person to pay is expressly limited to payment within a specified time, or to payment of principal only, and where if the limitation be communicated to the creditor he would be prevented from relying on payments beyond his authority. There was no time limited by the deed of the 13th of April, 1883, within which the continuing partners were to pay. Nor was anything said about interest and an authority to pay an interest bearing debt, in a case where no express time is limited for payment of the principal, is an authority to pay the interest accruing due before payment of the principal. And clearly where a person is authorized to pay a debt for another, for and on that other's behalf, he is entitled to pay it in the name of the debtor. And that is what was done here—for the continuing partners paid in the name of *Baker, Tuckers & Co.*, which was the name under which the debtor, *William Tucker*, had always made his payments on account of the interest. Moreover, in this case the special provisions of the deed of the 13th of April, 1883, convince me that it was not contemplated by the parties thereto that the debts of *William Tucker* should or would be paid off speedily. I may specially refer to the provision in clause 2 as to notice of the dissolution not being given or gazetted, and I gather that the dissolution never was gazetted. It appears to me that a provision of that class is aimed (*inter alia*) at preventing the

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creditors of the firm from knowing of the change in the *personnel* of the firm, lest they should require speedy payment of their debts—a result which the parties to the deed were desirous of avoiding. And I further gather that the continuing partners were entitled to continue the business in the old name. And, lastly, seeing that *William Tucker* retained a considerable interest in the business after his retirement up to the end, and looking to his dealings with the firm which are admitted by the pleadings, coupled with the fact that *William Tucker* has not thought fit to go into the box or to call any witnesses on his behalf, I infer that he was aware that the payments of interest on the debt in the name of *Baker, Tuckers & Co.* were being continued as above stated. For these reasons I hold that *William Tucker* remains liable for the debt. I ought, perhaps, before leaving this part of the case, to refer to the decision of Vice-Chancellor *Hall* in *Watson* v. *Woodman* (1). That decision in no way conflicts with the views I have above expressed. What the Vice-Chancellor had there to deal with was a case of joint debtors, one of whom arranged with his co-debtor that the latter should pay and discharge the debt, and all that the Vice-Chancellor decided was that with reference to the operation of sect. 14 of the *Mercantile Law Amendment Act*, 1856, the subsequent payments on account of the debt by the co-debtor in his own name must be held to have been made by him in respect of his own liability, and not for or on behalf of the other debtor. This really was the ground of his decision (2). It was not the case of a secret retirement of one member of a firm owing a debt, and of payments being made on account of the debt in the old name of the firm by the partners continuing the business under the private arrangement. Nor was it a case where the partner continuing the business in part made payments for or on behalf of the member who had retired, and with his authority. The Defendant *William Tucker* must be ordered to pay into Court the amount of the principal debt with interest due since the last payment of interest. He ought to have a reasonable time within which to make such payment; he must be ordered to pay the costs of the action against him so far only as it sought to establish

(1) Law Rep. 20 Eq. 721. (2) Law Rep. 20 Eq. 730.

his personal responsibility for the debt. The statement of claim also sought to make *William Tucker* liable on the footing of his being constructively or otherwise a trustee of the debt for the Plaintiffs. No doubt *William Tucker* knew the debt was due to the trustees of *Stephen Tucker's* will; but the Plaintiffs did not establish before me a case for making him liable as trustee. And so far as his costs have been increased by this claim the Plaintiffs must pay them, with set-off. All that remains now is to consider the question of the liability of the trustees for not having previously got in the debt. If *William Tucker* can and does pay, then no loss has resulted by the neglect. I gather that he can pay. But as this is not certain, and, moreover, in any case it may be material on the question of costs, and as the point has been raised and argued before me, I think I ought to decide it. Now, hard as the case is against the trustees, and reluctant as I am under the circumstances to decide the point against them, I cannot bring myself on the terms of the will of the testator *Stephen Tucker* to hold that they were authorized to lend the money in question to any firm but that which at the date of the will and of the testator's death carried on business under the name of *Baker, Tuckers & Co.* I do not think he contemplated or authorized the lending of the money to any persons (not being the members of the last-mentioned firm) who might as purchasers or otherwise be for the time being carrying on business under the same name. I think the testator authorized the lending of the money only to the firm of *Baker, Tuckers & Co.* as constituted at the date of his death, and the continuance of the loan as a "deposit" with that firm so long as it existed, and no longer. There is nothing in this will which points to a continuance of the "deposit" after any member of the firm may have died or retired. *Primâ facie,* a testator when authorizing by his will a loan to a firm does so because he has faith in and places reliance on the members of that firm as constituted at his death; and in this case it is to be observed that the testator was during his lifetime connected with the business when carried on by *William* and *Henry Tucker,* and that in his will he speaks of the money being placed "in the hands" of the firm should "they" be willing to receive it.

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This being so, I am of opinion that when the firm existing at the testator's death became dissolved by the death of *Henry Tucker*, it was the duty of the then trustees, and of the subsequent trustees, to have got the money in, and that they committed a breach by not so doing for which they are responsible, and, if any loss has resulted therefrom, to the extent of such loss, so far as necessary to make good the Plaintiffs' interest in the money, and subject, as to the Plaintiff *Mary Tucker*, to the operation of sect. 8 of the *Trustees Act*, 1888; and I so declare. Having made this declaration, I propose, as against those representing the estate of the deceased trustee *James Kayess*, to direct an inquiry, whether any and what loss has accrued to the trust estate by reason of the neglect of *James Kayess* while he continued to be trustee to get in the debt after *Henry Tucker's* death, either from *Henry Tucker's* estate or from *William Tucker*. Take a similar inquiry against *Stephen Baker Tucker* as to neglect for not getting in the debt from *William Tucker*. Seeing that any claim against *Henry Tucker's* estate had been barred by the *Statute of Limitations* before *Stephen Baker Tucker's* appointment, there clearly could have been no negligence on his part in not getting the debt in from that estate. Then, in order to give time to see whether payment can be obtained from *William Tucker*, I direct that the above inquiries shall not be proceeded with without the leave of the Court. I adjourn further consideration before myself, and reserve the costs of the action as against the representatives of *James Kayess*, and against *Stephen Baker Tucker* to be dealt with on further consideration, when it will be known whether any loss has occurred by the breach of trust. The existing trustees, *Stephen Baker Tucker* and the Defendant *Charles Cannon*, offer at the Bar to retire, and I refer it to Chambers to appoint new trustees in their place. As *Charles Cannon* has been declared a bankrupt, it is admittedly of no use proceeding with this action further against him. I therefore order further proceedings to be stayed as against him. He asked for his costs. But seeing that he disputed that he had been guilty of any breach of trust, or of any neglect of his duties, and only offered to retire when the action came on for trial, I think justice will be done by

making no order as to the costs of the action against him. There will be liberty to apply. So far as I can see at present, there is no necessity for administering the trusts or taking any accounts; but should the necessity arise, the Plaintiffs can come to the Court under the liberty to apply.

Solicitors for Plaintiffs: *Tocque & Rodyk.*

Solicitors for several Defendants: *P. H. Edwards; T. Allingham; Tufnell Southgate & Son; Hughes & Sons.*

H. L. F.

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*Jan.* 11; *Feb.* 10.

## *In re* STOCK AND SHARE AUCTION AND BANKING COMPANY.

## *In re* SPIRAL WOOD CUTTING COMPANY.

## *In re* HULL LAND AND PROPERTY INVESTMENT COMPANY.

*Company—Winding-up—Voluntary Liquidator—Undistributed Assets—Payment into Companies Liquidation Account—Order to submit verified Account—Control of Board of Trade—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 15.

The Board of Trade can enforce the provisions of sect. 15 of the *Companies (Winding-up) Act*, 1890, against liquidators, not only in a winding-up by order of the Court, but also in a voluntary winding-up, whether continued under the supervision of the Court or not.

IN the case of the *Stock and Share Auction and Banking Company, Limited*, a winding-up petition was presented on the 17th of February, 1891. On the 28th of the same month the company passed an extraordinary resolution in favour of winding-up, and on the 7th of March, 1891, Mr. Justice *Stirling* made an order to continue the voluntary winding-up of the company under the supervision of the Court.

On the 25th of November, 1893, the solicitor of the Board of Trade gave notice of motion against the voluntary liquidator for an order that he should forthwith pay into the *Bank of England*, to the credit of the Companies Liquidation Account, the sum of £929 19*s.* 8*d.*, alleged to be the amount of money, representing unclaimed or undistributed assets of the company, which had remained unclaimed or undistributed for six months after the date of their receipt, and alleged to be shewn by his account to be in his hands or under his control as liquidator.

The *Spiral Wood Cutting Company, Limited*, passed a resolution on the 3rd of November, 1890, which was confirmed as a special resolution on the 20th of November, 1890, for voluntary winding-up, and appointing a liquidator.

On the 15th of June, 1893, the Board of Trade ordered the liquidator to submit, within seven days after service on him of the order, an account, verified by affidavit, of the sums

received and paid by him as such liquidator. On his non-compliance with the order the Board of Trade moved, on notice, for an order that within four days he should comply with the order of the Board of Trade.

The *Hull Land and Property Investment Company, Limited,* passed an extraordinary resolution on the 30th of April, 1889, in favour of voluntary winding-up and appointing a liquidator. In this case the Board of Trade moved, on notice, for an order similar to that in the first-named case.

The applications came on for hearing before Mr. Justice *Wright,* in Court on the 11th of January, 1894, but they were adjourned to, and heard before Mr. Justice *Vaughan Williams,* in his private room on the same day. The argument below is from a transcript of the shorthand notes lent to the reporter by the solicitor of the Board of Trade.

Sir *C. Russell,* A.G., *Ingle Joyce,* and *Reginald Smith,* in support of the applications:—

The question common to all three cases is, whether sect. 15 of the *Companies* (*Winding-up*) *Act,* 1890 (1), coupled with sect. 162

(1) 53 & 54 Vict. c. 63, s. 15: [*Information as to pending liquidations.*]—"(1.) If the winding-up of a company is not concluded within one year after its commencement, the liquidator of the company shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the Registrar of joint stock companies a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation. Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof, or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the liquidator or of the Official Receiver.

"(2.) If a liquidator makes default in complying with the requirements of this section he shall be liable to a fine not exceeding fifty pounds for each day during which the default continues.

"(3.) If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the *Bank of England.* Every such liqui-

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of the *Bankruptcy Act*, 1883, which is incorporated in it, applies to a winding-up which is not "by order of the Court."

The Act of 1890 is not confined, in its operation, to what are known as "compulsory liquidations." Sect. 10—the misfeasance clause of the Act—which enables the Court to assess damages against delinquent directors, officers, and promoters, is expressly applied, by sub-sect. 2, to "the winding-up of any company under the *Companies Acts*, whether the same is being wound up by or subject to the supervision of the Court or is being wound up voluntarily."

Then sect. 11 provides for the keeping of the Companies Liquidation Account; and by sub-sect. 2, "every liquidator of a company which is being wound up by order of the Court" is to pay the money received by him into this account.

Sect. 14 enables the Official Receiver, where a voluntary winding-up or a winding-up under supervision cannot be continued with a due regard to the interests of the creditors or contributories, to petition for "an order that the company be wound up by the Court."

Then comes sect. 15, which is not confined to any particular sort of winding-up, but applies to all the three kinds by the force of its initial words, "If the winding-up of a company," &c.

Sect. 162 of the *Bankruptcy Act*, 1883, which is incorporated in sect. 15 of the Act of 1890, closely corresponds, in its character,

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dator shall be entitled to the prescribed certificate of receipt for the moneys so paid, and that certificate shall be an effectual discharge to him in respect thereof.

"(4.) For the purpose of ascertaining and getting in any money payable into the *Bank of England* in pursuance of this section, the like powers may be exercised and by the like authority as are exerciseable under section one hundred and sixty-two of the *Bankruptcy Act*, 1883, for the purpose of ascertaining and getting in the sums, funds, and dividends referred to in that section.

"(5.) Any person claiming to be entitled to any money paid into the *Bank of England* in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board of Trade may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due. Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court.

"(6.) This section shall apply whether the winding-up of the company has commenced before or after the commencement of this Act."

with sections of prior bankruptcy statutes. Sub-sects. 1 and 2 (*a*) provide for payment into the Bankruptcy Estates Account of unclaimed and undistributed moneys, these clauses being re-enacted with the necessary modifications in sub-sect. 3 of sect. 15 of the Act of 1890. Sub-sect. 2 (*b*) empowers the Board of Trade to order the trustee to submit a verified account, and to enforce an audit (1); and sub-sect. 2 (*c*) gives powers to the Board of Trade to collect unclaimed or undistributed funds (1). It is under sect. 15 of 1890 and sect. 162 of 1883, that the Board of Trade order to submit a verified account has been made, and this order can be enforced in the manner pointed out by sect. 102, sub-sect. 5, of the *Bankruptcy Act*, 1883 (2).

Then sect. 26 of the Act of 1890 empowers the Lord Chancellor, with the concurrence of the President of the Board of Trade, to "make general rules for carrying into effect the objects of this Act," and provides that such rules "shall have effect as if enacted by this Act."

(1) *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 162, sub-s. 2 (*b*) and (*c*):—

"(2.) (*b*). The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account."

"(*c*) The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or undistributed funds or dividends, and for the purposes of this section any Court having jurisdiction in bankruptcy shall have and at the instance of the person so appointed, or of the Board of Trade, may exercise all the powers conferred by this Act with respect to the discovery and realization of the property of a debtor, and the provisions of Part I. of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section."

(2) *Bankruptcy Act*, 1883, s. 102, sub-s. 5: "Where default is made by a trustee, debtor, or other person in obeying any order or direction given by the Board of Trade or by an Official Receiver or any other officer of the Board of Trade under any power conferred by this Act, the Court may, on the application of the Board of Trade or an Official Receiver or other duly authorized person, order such defaulting trustee, debtor, or person to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."

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[VAUGHAN WILLIAMS, J.:—That will not help the matter; if a rule is *ultrà vires*, it will not apply.]

The only other material section of the Act of 1890, if it is material, is sect. 31, on which the Respondents will rely.

Several sets of rules have been made to carry out the Act of 1890. Rule 126 of 1890 is directly applicable to the subject-matter of sect. 15, and applies in terms, not only to "the case of companies wound up by order of the Court," but also to "the case of companies wound up voluntarily or under the supervision of the Court." The framers of the rule, therefore, thought that sect. 15 applied to all kinds of winding-up. Rule 128 of 1890 provides for every person who has acted as liquidator of any company furnishing certain information to the Board of Trade, and rule 129 provides, by clause 1, that "the Board of Trade may at any time order any such person to submit to them an account verified by affidavit of the sums received and paid by him as liquidator of the company, and may direct and enforce an audit of the account." Clause 2 of rule 129 says that for the purposes of sect. 15 and those rules the Court, as thereinafter defined, shall have the powers given by the *Bankruptcy Act*, 1883, with respect to the discovery and realization of the property of a debtor. Rule 130 originally defined "the Court," but that rule was annulled by the rules of April, 1891, and rule 130*a* (rule 7 of April, 1891) was substituted for it. This rule was partly annulled by rule 34 of April, 1892, and rule 16 of April, 1892, was substituted for paragraph (*a*), the portion annulled. Rule 130*a* refers to all three kinds of winding-up, the effect being that your Lordship has jurisdiction to hear these applications whatever the mode of winding-up may be. Those rules were all approved by Lord *Halsbury*, L.C., and the President of the Board of Trade. The form of liquidator's statement of account, under sect. 15 (Form 75) also requires the "nature of proceedings [whether wound up by the Court or under the supervision of the Court, or voluntarily]" to be stated. The preliminary notice to liquidators issued by the President of the Board of Trade on the 31st of December, 1890, also refers to sect. 15, as applying whether the company is "wound up by the Court, or under the supervision of the Court, or voluntarily."

The language of all these provisions, and good sense, and reason appear to require that the Court should have the jurisdiction, whatever kind of winding-up is going on.

*Boome*, for the liquidator of the *Stock and Share Auction and Banking Company*:—

Most of the sections and rules which are applicable have been referred to. Sect. 20, sub-sect. 1, of the Act of 1890, provides that "every liquidator of a company which is being wound up by order of the Court shall" at certain times send an account to the Board of Trade; and sect. 25 gives the Board of Trade control over liquidators, but in terms it applies only to the case of "companies which are being wound up by order of the Court." Sect. 15 must be read with those two sections, in order to make a voluntary liquidator liable to the control of the Board of Trade. Sect. 11 only refers to the Companies Liquidation Account, which is to be kept by the Board of Trade; but the liquidator is only required to pay money into it when the company is being "wound up by order of the Court."

Sect. 31 is most important. By sub-sect. 1: "This Act shall not, except where it is expressed to have a more extended application, apply to any company which is being wound up in pursuance of an order made before the commencement of this Act"; and by sub-sect. 2: "For the purposes of this Act a company shall not be deemed to be wound up by order of the Court if the order is to continue a winding-up under the supervision of the Court." These provisions, coming almost at the end of the Act, control the whole of it. In sect. 10 winding-up voluntarily, and under supervision, are specially mentioned, but that is not so in the case of sect. 15. The Act of 1890 was not intended to give the Board of Trade control over voluntary liquidators. Such a liquidator gives no security, and renders his accounts in the manner pointed out by the Act of 1862. If there is any irregularity, the Official Receiver can apply for a winding-up order under sect. 14; but until such an order is made the Board of Trade has no right to interfere with the liquidator.

[VAUGHAN WILLIAMS, J.:—Then you must say that sect. 31

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so controls sect. 3, sub-sect. 1, which refers to the transfer of "the winding-up of a company or any proceedings therein," that sect. 3 only applies to a winding-up by the Court.]

Such an innovation as allowing the Board of Trade to control voluntary liquidators should not be allowed, unless the power is specifically given by the Act; and it is not so given.

*T. Bateman Napier*, for the liquidator of the *Spiral Wood Cutting Company*:—

In this case the liquidation is purely voluntary, and there are only three sections of the Act of 1890—viz., sects. 10, 14, and 15, which can possibly refer to a voluntary winding-up.

[VAUGHAN WILLIAMS, J.:—You must also include sect. 3. Under sect. 138, of the Act of 1862, shareholders may apply to the Court in a voluntary winding-up, and then, I apprehend, applications for transfer may be made under sect. 3 of the Act of 1890.]

At any rate, the rest of the Act only applies to compulsory winding-up. As the expression "voluntary winding-up" is used only in sects. 10 and 14, it may be inferred that no other section was intended to apply to such a kind of winding-up. For instance, sect. 4, sub-sect. 4, says that "If any vacancy occurs in the office of liquidator of a company, the Official Receiver shall, by virtue of his office, be the liquidator during the vacancy." Taken alone, that clause would apply to all liquidators, though when read with the context it clearly does not apply to a voluntary liquidator.

[VAUGHAN WILLIAMS, J.:—I agree, because the context of sect. 4 shews that it only applies to a liquidator who acts upon "an order being made by the Court for winding-up." That does not help you.]

Just as I am entitled to read the rest of sect. 4 to find the meaning of sub-sect. 4, so I am entitled to read the rest of the Act to find the meaning of sect. 15, and the context refers to compulsory winding-up only, except in sects. 10 and 14.

The object of sect. 15 was to cover to a great extent the same ground as sect. 11. By sect. 11, sub-sect. 4, the liquidator is to

pay anything over £50 into the Companies Liquidation Account within ten days, a penalty being imposed in case of default. Sect. 15, sub-sect. 3, also requires the liquidator to pay money into the same account. The sting of sect. 15 is that, by sub-sect. 6, it applies whether the winding-up commenced before or after the commencement of the Act. It applies a less stringent mode of procedure than that given by sect. 11, to the case of a pending compulsory liquidation.

Numerous cases, which must have been in the knowledge of the Legislature, had decided, prior to the passing of the Act of 1890, that in the case of a voluntary liquidation the company was a domestic forum. In such a case the liquidator is bound to call a yearly meeting and submit his accounts to the shareholders, and if the Legislature had intended to subject him to the control of the Board of Trade in the matter of his accounts, it would have used language not so ambiguous as that employed in sect. 15.

The liquidator of the *Hull Land and Property Investment Company* appeared in person, but did not address the Judge on the question of jurisdiction.

*Ingle Joyce*, in reply.

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The question which I have to decide in these cases is whether sect. 15 of the *Companies (Winding-up) Act*, 1890, applies to voluntary liquidations, or to voluntary liquidations continued under supervision of the Court, so as to enable the Board of Trade to enforce the provisions of the section against the voluntary liquidator. I am of opinion that sect. 15 of the Act does so apply, both to voluntary liquidations and to voluntary liquidations continued under supervision. So far as the words of sect. 15 are concerned, there is nothing to limit the application of the section to companies which are wound up under the order of the Court. But then it is said that the Act of 1890 has no application to voluntary liquidation—and no doubt generally this is true—and, further, it is said that where the Legislature

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meant this Act to apply to voluntary liquidation it used express words, as is done in the second sub-section of sect. 10. And it is urged generally that voluntary liquidation, at all events when it is not subject to the supervision of the Court, is, by the whole scope of the Act of 1862, a domestic proceeding intentionally left by the Legislature under the control of the contributories, or in the case of supervision the contributories and the creditors, and that the manifest intention of the Act of 1890 is to exclude such liquidation from the operation of the Act and the statutory control of the Board of Trade. I do not think that these arguments should prevail. The words of the section contain no such limitation. Section after section of the Act is limited expressly to companies being wound up by the Court. Sect. 15 is not so limited, and I have come to the conclusion that it is intentionally not so limited, and that the omission of the limitation is not *per incuriam.* Some argument was sought to be based upon sect. 31, sub-sect. 2, but that sub-section only seems to me to define what is a winding-up "by order of the Court," and it does not say that the Act shall not apply to any other winding-up.

Solicitors: *Solicitor to the Board of Trade; A. Slater; Leonard H. West,* agent for *Iveson & West, Hull.*

F. E.

END OF VOL. I.

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**BUILDING SOCIETY**—*Dissolution—Priority of Payment of Members.*] The rules of a building society, registered in 1875 under the Building Societies Act, 1874, fixed the amount of each share at £12, and provided that any unadvanced member who might desire to withdraw from the society should, by giving one month's written notice to the directors at a monthly meeting, be entitled to receive back the net amount of his monthly subscriptions paid in, but it more than one member should give notice to withdraw at one time, they should be paid in rotation according to the priority of notice, but the directors should not be compelled to pay more than one applicant for withdrawal at any one monthly meeting. Early in 1889 the auditors discovered that the society had suffered a serious loss through the defalcations of the secretary. At the annual meeting on the 16th of April this was made known to the members, and it was resolved to appoint an accountant to go through the books and submit a statement at a subsequent meeting. An accountant was accordingly engaged, and, on the 26th of July, he issued a report to the members, with a profit and loss account for the year ending the 28th of February, 1889, and a balance-sheet at that date, which showed a deficiency of £7000. He recommended that steps should be taken to reduce the capital of the society, but said there was no reason why the society should not, with judicious and economical management, have a good future before it. At an adjourned meeting on the 30th of July the accountant's report and balance-sheet were adopted by the members, and it was resolved that it was desirable that the nominal share of £12 should be reduced to £10, in order to meet the losses. The rules of the society were altered, and at a special general meeting on the 12th of February, 1890, the altered rules were adopted, and the reduction of the shares to £10 was sanctioned. The altered rule as to the withdrawal of members provided that any member, by giving one month's written notice, should be entitled to withdraw the amount standing to his credit in the books of the society, and that the amount due from the society to each member in respect of any share or shares held by him on the 28th of February, 1889, should be deemed to be five-sixths of the net amount paid on such share or shares, and no member should be entitled to receive back from the society, should he withdraw his share or shares so held on the 28th of February, 1889, more than the amount so deemed to be due to him. On the 11th of November, 1892, an instrument of dissolution of the society was executed, pursuant to sect. 32 of the Building Societies Act, 1874, and it was registered on the 16th of November:—*Held*, that the members were bound by the rules from time to time made, and therefore by the reduction of the shares, but that members who had given notice to withdraw, and whose notices had matured before the date of the deed of dissolution, were, notwithstanding the winding-up, entitled to be paid in priority according to the dates of their notices. BARNARD *v.* TOMSON - - - - - - 374

**BURIAL GROUND**—"*Disused Burial Ground*"—*Partial User—Order in Council—Building Restrictions—Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 2, 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 2, 4, *and Schedule.*] Under the combined operation of the Metropolitan Open Spaces Act, 1881, s. 1, the Disused Burial Grounds Act, 1884, s. 2, and the Open Spaces Act, 1887, ss. 2, 4, and Schedule, a "disused burial ground"—upon which building is prohibited by sect. 3 of the Act of 1884—means any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, whether interments have taken place in it or not, and which has been partially or wholly closed under the provisions of any statute or Order in Council, or has become otherwise disused. *In re* PONSFORD AND NEWPORT DISTRICT SCHOOL BOARD - - - - - - C. A. 454

**BURIAL GROUND**—*continued.*

**CAPITAL**—Application of, under Settled Land Acts - - - - 1, 189, 485
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—— *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (18 Q. B. D. 714) followed - - 599
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—— *Cranley* v. *Dixon* (23 Beav. 512) followed
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—— *Crawley* v. *Crawley* (7 Sim. 427) followed
*See* EXECUTOR. 4. [678

—— *Creaton* v. *Creaton* (3 Sm. & Giff. 386) considered - - - - - 43
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—— *Dickson, In re* (29 Ch. D. 331), followed
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—— *Greville* v. *Browne* (7 H. L. C. 689) followed *See* Executor. 3. [693

—— *Guthrie* v. *Walrond* (22 Ch. D. 573) distinguished - - - - 665 *See* Infant. 2.

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—— *Hendriks* v. *Montagu* (17 Ch. D. 638) considered - - - - 537 *See* Company. 4.

—— *Hill* v. *Wallasey Local Board* ([1892] 3 Ch. 117) reversed - - - 133 *See* Local Government. 2.

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—— *Marshall* v. *Gingell* (21 Ch. D. 790) considered - - - - 43 *See* Will. 3.

—— *Medlock, In re* (55 L. J. (Ch.) 738), followed *See* Infant. 2. [665

—— *Meyerstein's Trade Mark, In re* (43 Ch. D. 604), considered - - - 645 *See* Trade-mark. 3.

—— *Meyler* v. *Meyler* (11 Law Rep. Ir. 522) approved - - - - 661 *See* Settlement. 2.

—— *Mytton* v. *Mytton* (Law Rep. 19 Eq. 30) considered - - - - 491 *See* Will. 2.

—— *Peters* v. *Lewes and East Grinstead Railway Company* (18 Ch. D. 429) dictum approved - - - - 334 *See* Will. 7.

—— *Raikes* v. *Boulton* (29 Beav. 41) followed *See* Executor. 3. [693

—— *St. Bartholomew's Hospital (Governors of), Ex parte* (Law Rep. 20 Eq. 369) followed - - - - 185 *See* Lands Clauses Act.

—— *Saunders* v. *Davies* (34 Ch. D. 482) followed *See* Executor. 3. [693

—— *Spence* v. *Spence* (12 C. B. (N.S.) 199) considered - - - - 43 *See* Will. 3.

—— *Stanley* v. *Stanley* (2 J. & H. 491) considered *See* Will. 4. [316

—— *Tattersall* v. *Groote* (2 Bos. & P. 131) distinguished - - - - 521 *See* Partnership. 1.

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—— *Tempest* v. *Lord Camoys* (21 Ch. D. 571, 576, n.) explained - - - 324 *See* Infant. 1.

—— *Travers* v. *Blundell* (6 Ch. D. 436) distinguished - - - - 316 *See* Will. 4.

—— *Turner* v. *Mullineux* (1 J. & H. 334) distinguished - - - - 286 *See* Will. 1.

—— *Turton* v. *Turton* (42 Ch. D. 128) considered *See* Company. 4. [537

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**CAUSE OF ACTION**—Continuing—Assessment of damages - - - - 293 *See* Practice. 3.

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**CHARITY**—*Will—Mortmain—Gift to Charity of such part of Residue "as may by law be given for Charitable Purposes"—Will made before passing of the Mortmain and Charitable Uses Act,* 1891—*Death of Testator after passing of Act—Mortmain and Charitable Uses Act,* 1891 (54 *&* 55 *Vict. c.* 73), *s.* 9—*Wills Act* (1 *Vict. c.* 26), *s.* 24.] A testator, by his will made before the passing of the Mortmain and Charitable Uses Act, 1891, bequeathed the residue of his estate to trustees in trust to pay the income thereof to his wife for her life, and from and after her decease in trust to pay "such part of his residuary trust estate which may by law be given for charitable purposes" to the Brompton Hospital; and as to the remainder of the said residuary trust estate, upon trust for E. W. absolutely.—The testator died after the passing of the Act:—*Held* (affirming the decision of North, J.), that the Act applied, and that as the will did not shew any intention on the part of the testator to confine the gift to the hospital to such part of the residue as could by the law as it stood at the date of the will be given for charitable purposes, the hospital was entitled to all the residue, real as well as personal. *In re* Bridger. Brompton Hospital for Consumption *v.* Lewis - - - C. A. 297

**CHILD**—Illegitimate—Construction of will 561 *See* Will. 5.

**CLOSE COPIES**—Taxation of costs - - 289 *See* Solicitor. 2.

**COMMISSION**—To examine witnesses abroad 38 *See* Practice. 4.

**COMPANY**—*Alteration of Articles — Companies Act,* 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 16, 50—*Companies Act,* 1879 (42 *&* 43 *Vict. c.* 76), *s.* 5—*Reserve Capital.*] A company cannot contract itself out of the power to alter its articles.—One of the articles of association provided that £4 a share should be reserved capital not capable of being called up, except in case of a winding-up, and that a special resolution to that effect should be passed in accordance with the Companies Act, 1879. No valid special resolution to this effect

COMPANY—*continued.*

was passed, and ultimately a special resolution was passed repealing the article:—*Held*, that this was valid. MALLESON *v.* NATIONAL INSURANCE AND GUARANTEE CORPORATION - - 200

2. —— *Director—Liability—Ultrà vires—Investment of Money in Shares of another Company—Temporary Investment—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 1, 8.] Directors of a company are trustees, as to moneys of the company which have come to their hands or are under their control, within the meaning of the Trustee Act, 1888, s. 1, sub-s. 3, and therefore can, in the absence of fraud, take advantage of the Statute of Limitations in proceedings against them for misapplication of the funds of the company.—The directors of the L. A. Company, which had no power to invest its capital in the shares of other companies, in March, 1885, accepted fully paid-up shares in the B. S. Company to the amount of £35,000 in discharge of a debt. This was referred to in the balance-sheet of the L. A. Company as "Assets. By B. S. Company," and the entry was explained by the chairman at the general meeting in April, 1885, to mean that it represented the amount due from the B. S. Company for an estate purchased from the L. A. Company. The same item was repeated in successive balance-sheets till 1889. The investment was made without any fraudulent intent. The L. A. Company was wound up in 1893:—*Held* (affirming the decision of Wright, J.), that, assuming that the directors had been guilty of a breach of trust in investing the money in shares of the B. S. Company, they were protected by the Statute of Limitations; and that there had been no such fraudulent concealment on their part, notwithstanding the false statement by the chairman at the meeting, to prevent time from running under the statute.—Whether the directors had not power to accept the shares of the B S. Company, if they took them as a compromise for the debt, and not with the intention of retaining them as a permanent investment—*Quære.*—In July, 1889, the directors of the same company passed a resolution to invest a further sum of £5200 in more paid-up shares of the B. S. Company. Two directors, B. & T., were not present at the meeting, but they were present at the next meeting, at which the minutes of the previous meeting were read and confirmed. B. was in the chair and signed the minutes. B. was also in the chair at the next general meeting of the company, and he then referred to the new investment, and, speaking on behalf of the directors, said: "We carefully considered the matter, and deemed it advisable to exercise our right of subscription, and have no reason to regret our decision":—*Held* (reversing the decision of Wright, J.), that although the presence of B. and T. at the meeting at which the minutes of the previous meeting were confirmed was not sufficient in itself to make either of them liable for the ultrà vires investment, yet B. had by his action as chairman at that meeting, and by his statement at the general meeting, shewn that he took an active part in the investment, and must be held responsible for it. *In re* LANDS ALLOTMENT COMPANY - - - - - C. A. 616

COMPANY—*continued.*

3. —— *Director—Qualification—Implication of Agreement to take Shares—Estoppel.*] In order to fix a director with liability in respect of his qualification shares where these have been registered in his name without any application by him and without his knowledge, it must be shewn that he has acted as a director at a time when he could not properly so act without possessing the qualification.—The articles of a company provided that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; that the office of a director was to be vacated if he ceased to hold the requisite number of shares, or, in the case of a first director, if he failed to get them within the prescribed period.—C. signed the memorandum of association for one share, and was appointed a first director. He attended several board meetings, but never applied for his qualification shares. At the first general allotment, however, without his knowledge, his qualification shares were allotted to him, and he was placed on the register of shareholders in respect of them. As soon as he became aware of the allotment and registration, he requested that his name might be removed, and the day after the expiration of the prescribed period he sent in his resignation, and thereafter did not act as a director. The company was not in liquidation. On the application of C. to have his name removed from the register:—*Held*, that he could not be fixed with constructive notice of the fact that his name was on the register; that there was no implied agreement on his part to take the shares; that he had not so acted as to be estopped from denying that he had entered into any such agreement; and that his application must be allowed. *In re* PRINTING, TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS. EX PARTE CAMMELL - - - - - - 528

4. —— *Foreign Company—Similarity of Name—Right of Foreign Company to Trade in England under its Foreign Name.*] The Defendants were incorporated in Canada under the name of "The Sun Life Assurance Company of Canada," and, after carrying on business in Canada under that name for over ten years, they opened an office in London, and claimed the right to carry on business in this country under their corporate name.—In an action for injunction by an English company, who had carried on business in this country for more than eighty years under the name of "The Sun Life Assurance Society":—*Held*, (1.) that, in the absence of fraud or dishonesty, the user by the Defendants of their own corporate name without abbreviation, addition, or other modification, involved no misstatement of fact, and could not, consistently with *Turton* v. *Turton* (42 Ch. D. 128), be restrained by injunction; but *held*, (2.) that the right of the Defendants did not extend to the use of the name of "The Sun" or "The Sun Life," without the addition of the words "of Canada." — *Hendriks* v. *Montagu* (17 Ch. D. 638) and *Turton* v. *Turton* discussed. SAUNDERS *v.* SUN LIFE ASSURANCE COMPANY OF CANADA 537

5. —— *Winding-up—Contributory—Paid-up Shares—Statement accompanying Certificate—*

**COMPANY**—*continued.*

*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] A company was formed for acquiring the business of two persons who were manufacturers of medicated food and wine. It was agreed that the purchase-money should be paid partly in cash and partly in fully paid-up ordinary shares of £1 each: and in addition to this forty fully paid-up "founders' shares" of £25 each were to be allotted to the vendors or their nominees. This agreement was never registered. The promoters of the company and the company after its incorporation entered into negotiations with various medical men to induce them to recommend to their patients and others the goods sold by the company, promising them each one of the founders' fully paid-up £25 shares. As soon as the company was incorporated the directors signed certificates for the "founders' shares" with the names in blank. These the secretary filled up and sent one to each of the medical men who had consented to accept shares. It did not appear on the certificates that the shares were paid up, but the secretary in his correspondence with the recipients told them expressly that the shares would be fully paid up and would involve no liability. The recipients acknowledged the receipt of the certificates without any condition or qualification. None of the recipients were placed on the register of shareholders, nor was any agreement with them registered. A few months afterwards the company held a meeting and passed a resolution for a voluntary winding-up: and in contemplation of the meeting the secretary wrote to all the medical men who had received the certificates of "founders' shares," asking for a return of the certificates on the ground that the shares had never been allotted. The certificates were accordingly returned. The liquidator placed the recipients of the certificates on the list of contributories; and they applied to have their names removed:—*Held* (affirming the decision of Vaughan Williams, J.), that the applicants had never agreed to take any but paid-up shares, and that their names must be removed from the list of contributories. *In re* MACDONALD, SONS & CO. - - C. A. 89

6. —— *Winding-up—Debenture-holders' Action—Receiver—Appointment of Official Receiver to be Receiver for Debenture-holders.*] An order to wind up a company was made, and on the same day a receiver was appointed in an action, by debenture-holders. The estimated value of the assets was sufficient to cover the debentures, leaving only a small margin. The Official Receiver applied to have the receiver discharged and to have himself appointed receiver. Vaughan Williams, J., held that when both a receiver's action and a winding-up by the Court were pending, the Court would, in the absence of special circumstances, appoint the Official Receiver or liquidator to be receiver in order to avoid unnecessary expense and the possibility of conflict. His Lordship, therefore, discharged the receiver and appointed the Official Receiver to be receiver, he undertaking to keep a separate account on behalf of the debenture-holders. The debenture-holders appealed, and adduced fresh evidence

**COMPANY**—*continued.*

which satisfied the Court that a considerable part of the assets consisted of securities which could not be realized in the ordinary way of business, but could only be advantageously got in by a commercial liquidator:—*Held*, that Vaughan Williams, J., had proceeded on correct principles, but that, having regard to the special nature of the above securities, the receiver approved by the debenture-holders ought to be appointed to get them in, the Official Receiver being appointed receiver of all the other assets. BRITISH LINEN COMPANY *v.* SOUTH AMERICAN AND MEXICAN COMPANY - - C. A. 108

7. —— *Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163—*Foreign Action—Injunction.*] In the winding up of an English company whose assets were in Brazil, a part-performed contract for the sale of the Brazilian assets was agreed to be sold for £36,000. A creditor resident in England laid an embargo on the Brazilian assets, by levying execution on a judgment of a Brazilian Court, and thereby prevented payment of the £36,000. The creditor was ordered to remove the embargo on terms of a sum being placed to a separate account to meet any claim he might establish. *In re* CENTRAL SUGAR FACTORIES OF BRAZIL. FLACK'S CASE 369

8. —— *Winding-up—Petition for Winding-up by Order of the Court—Voluntary Winding-up—Creditors Prejudiced—Charges of Fraud on Outside Public—Public Examination—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 91, 145—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.] Where charges have been made against a company of having committed frauds (not in any way connected with its promotion or formation) in its dealings with members of the outside public, not being dealings with shareholders as regards their membership in the company, the desirability of investigating such charges under a compulsory winding-up is not a ground for saying that creditors will be "prejudiced by a voluntary winding-up," within the meaning of sect. 145 of the Companies Act, 1862. *In re* MEDICAL BATTERY COMPANY 444

9. —— *Winding-up—Voluntary Liquidator—Undisturbed Assets—Payment into Companies Liquidation Account—Order to submit verified Account—Control of Board of Trade—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 15.] The Board of Trade can enforce the provisions of sect. 15 of the Companies (Winding-up) Act, 1890, against liquidators, not only in a winding-up order of the Court, but also in a voluntary winding-up, whether continued under the supervision of the Court or not. *In re* STOCK AND SHARE AUCTION AND BANKING COMPANY. *In re* SPIRAL WOOD CUTTING COMPANY. *In re* HULL LAND AND PROPERTY INVESTMENT COMPANY - - - - - - 736

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**CONDITION**—Settlement—Residence in mansion-house—Infant - - - 351
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**CONFLICT OF LAWS**—Scotch judgment—Statute of Limitations - - - 147
*See* EXECUTOR. 1.

**CONTEMPT OF COURT**—*Circular—Libel—Merits of Action—Injunction restraining issue of Circular—Interlocutory Motion.*] Pending an action for infringing a trade-mark the Plaintiffs are at liberty to warn the trade by circular; but to introduce discussion of the merits of the action is a contempt. J. & P. COATS *v.* CHADWICK - 347

**CONTRACT**—Breach—Restraint of Trade 209
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**CONTRIBUTORY**—Paid-up shares - - 89
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**CONVERSION**—Partnership—Land employed in business - - - - - 393
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—— Lien for - - - - - - 556
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**COVENANT**—For title—Defect appearing on the conveyance - - - - - 11
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**DAMAGES**—Assessment of—Continuing cause of action - - - - - 293
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—— In lieu of injunction—Lord Cairns' Act 276
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**DEATH**—Without having been married - 480
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**DEBENTURE HOLDER**—Appointment of receiver - - - - - 108
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—— Acceptance of shares in lieu of debentures—Power of majority to bind minority 578
*See* ESTOPPEL.

**DEDUCTIONS**—Will—Construction—Income tax [286
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**DIRECTOR**—Liability—Statute of Limitations—Fiduciary character - - 616
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—— Qualification - - - - - 528
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**DISSOLUTION**—Building society—Priority of payment of members - - 374
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—— Partnership—Return of premium - 521
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**ECCLESIASTICAL LAW**—Disused burial ground [454
*See* BURIAL GROUND.

**ESTOPPEL**—*By Record—Assistance in defending previous Action—Privies in Estate—Debenture-holders—Compromise—Majority binding Minority—Receipt of Shares for Debentures.*] A resolution, purporting to be in pursuance of a power to compromise contained in a debenture trust deed given by an American company, was passed by a majority of the debenture-holders, such resolution being in favour of accepting, in lieu of the debentures, shares in an English company which had purchased the undertaking and property of the American Company, and covenanted to indemnify that company against its debts and obligations.—The Mercantile Company, who were debenture-holders who had dissented from the resolution and had not attended the meeting at which it was passed, recovered judgment against the American Company for arrears of interest due on their debentures, on the ground that there were no circumstances of difficulty which brought the power of compromise into play so as to enable the majority of debenture-holders to bind the dissentient minority.—The English Company assisted in the defence of this action, and, when the defence failed, paid the costs.—In a subsequent action, the Mercantile Company, suing on behalf of all the debenture-holders, sought to enforce against the English Company and the lands assigned to them by the American Company the charge on such lands purported to be given by the debentures.—Through want of registration in Mexico, in which the lands were, the debenture-holders had never acquired a charge on the lands valid according to the law of that country; and registration of the English Company's title was not completed until after judgment in the former action:—*Held*, that the English Company were not estopped by the judgment in the former action from adducing evidence to shew that, through non-registration of the debenture-holders' charge and otherwise, circumstances had existed which were sufficient to bring the power of compromise into operation, and that the resolution was binding on the Plaintiffs.—A purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against his vendor commenced after the purchase. And when such purchaser has given the vendor an indemnity, and has assisted him in defending an action brought by a third person, the purchaser is only estopped in subsequent proceedings between the vendor and the purchaser. MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY *v.* RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY - - - 578
—— Director—Agreement to take shares 528
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**EVIDENCE**—Abroad—Commission to take 38
*See* PRACTICE. 4.

**EXECUTOR**—*Administration—Debts—Certificate of Debts—Res Judicata—Scotch Judgment—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *s.* 3.] J. H. L. died in April, 1892, resident and domiciled in England, but having a small amount of property in Scotland. He had borrowed money from J. L., who was resident and domiciled in

**EXECUTOR**—*continued.*

Scotland, the recovery of which was barred by the Statute of Limitations in England, but not in Scotland. In December, 1892, J. L. commenced proceedings in Scotland against the administratrix of J. H. L. to recover the money. On the 17th of January, 1893, a creditor commenced an action in England for the administration of J. H. L.'s estate, and an administration order was made on the 20th of January. On the 1st of February judgment was given against the administratrix in the Scotch action in her absence; but on the 14th she obtained leave to defend. On the 24th of March J. L. applied to prove his debt in the English action, and by his affidavit stated the pendency of the Scotch action. The Chief Clerk refused to adjourn the question till after the decision of the Scotch action, and on the 1st of May made his certificate disallowing J. L.'s claim. On the 30th of May J. L. recovered judgment in the Scotch action, and on the 22nd of July this judgment was registered in England under the Judgments Extension Act, 1868, s. 3. The administratrix applied for an injunction to restrain J. L. from enforcing his judgment, and an injunction was granted by North J., who considered that J. L. was barred by the adjudication on his claim in Chambers:—*Held*, on appeal, that the injunction ought only to have been granted on the terms of admitting J. L. as a creditor for the amount of the judgment debt and the costs of registration, for that under the Judgments Extension Act, 1868, s. 3, J. L. was in the same position as if on the day of registration he had recovered judgment for the amount in an English Court against the administratrix, in which case, the assets being still under the control of the Court undistributed, it would have been of course to allow him to prove for the amount of the judgment in the administration. *In re* LOW. BLAND *v.* LOW - - - - C. A. 147

2. —— *Administration — Debts — Specific Legacy—Legatee Debtor to Estate—Retainer.*] Where a debtor to a testator's estate is a specific legatee of the profits of a business represented by moneys in the hands of the executors, the executors may retain such moneys as against the debt. *In re* TAYLOR. TAYLOR *v.* WADE - 671

3. —— *Administration—Legacies—Charge of Legacies on Residuary Real Estate—Gift of Real and Personal Estate "not otherwise disposed of" —Payment of Debts—Deficiency of Personal Estate —Contribution by Real Estate.*] The principle of *Greville* v. *Browne* (7 H. L. C. 689), whereby under a gift of legacies, followed by a gift of residuary real and personal estate, the legacies are held to be charged on the residuary real estate, is not confined to cases in which the residuary real and personal estate are given together as "residue," or "the rest" or the like.—A testator, after making specific devises and bequests, bequeathed pecuniary legacies, and then gave, devised, and bequeathed all the real and personal estate to which at his death he should be beneficially entitled "and not otherwise disposed of" to his executor absolutely. The personal estate was insufficient for the payment in full of the debts and pecuniary legacies:—*Held*, that the principle of *Greville* v. *Browne* applied, and that the legacies were charged on the residuary real estate.—*Hassel* v. *Hassel* (2 Dick. 527) followed.—*Held*, also, that the pecuniary legacies were not liable to contribute to the debts, but that the residuary real estate must contribute to the debts rateably with the specific devisees and legatees, according to its full value without deducting the amount of the pecuniary legacies. —*In re Saunders-Davies* (34 Ch. D. 482) and *Raikes* v. *Boulton* (29 Beav. 41) followed.—*Long* v. *Short* (1 P. Wms. 403) considered. *In re* BAWDEN. NATIONAL PROVINCIAL BANK OF ENGLAND *v.* CRESSWELL. BAWDEN *v.* CRESSWELL 693

4. —— *Administration — Legacies — Vested Legacies payable at Future Date—Fund set apart for—Interim Income—Capital or Income—Contingent Annuity—Surplus Income of—Tenant for Life and Reversioner.*] B., the donee of a general testamentary power of appointment over the residuary estate of A., deceased, by will, made in exercise of the power, appointed her residuary estate upon trust for L. for life with reversion to L.'s children, empowering her trustees to retain her estate in its actual state of investment at her death.—At the time of B.'s death, A.'s estate comprised (1.) a fund set apart and invested to answer certain legacies under A.'s will which had vested in the legatees at A.'s death, but were not payable until the legatees respectively attained twenty-five, and did not carry interest meanwhile; and (2.) Consols set apart to answer a conditional annuity payable or not at the discretion of A.'s trustees:—*Held*, first, that, applying the principle of *Crawley* v. *Crawley* (7 Sim. 427), B.'s interest in the interim income of the fund set apart to answer the legacies was in the nature of a terminable annuity, and that such interim income must, as between L. and her children, until the legatees respectively attain twenty-one, be treated as capital and invested, and that the dividends only of the investments must be paid to L.:—And, *held*, secondly (following *Cranley* v. *Dixon* (23 Beav. 512)), that the surplus dividends of the Consols set apart to answer the conditional annuity must, after providing for the annuity, be paid to L. as income. *In re* WHITEHEAD. PEACOCK *v.* LUCAS - - - 678

5. —— *Liability for default of Co-Executor—Putting Assets into sole Control of Executor.*] The proposition in *Candler* v. *Tillett* (22 Beav. 257), that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate is liable for the co-executor's misapplication of it must be read, "who unnecessarily does an act." Such an act is not "unnecessary" if it is done in the regular course of business in administering the property.—A testator up to his death was the registered holder of a large amount of American railway bonds. These bonds were issued payable to bearer, but the holder could register them, after which they could only be transferred by entry in the books of the company, but the owner could unregister them so as to make them again payable to bearer. Executors who desired to sell bonds of which their testator was registered holder could either sell and transfer them as registered bonds, or unregister them and then sell. It was proved that

**EXECUTOR**—*continued.*

the former course was extremely unusual. The testator appointed his wife and two stockbrokers, J. and C., his executors and trustees, and authorized J. and C. to charge for business done by them as stockbrokers for his estate. J. had been the testator's stockbroker. The executors determined to sell the bonds, and for that purpose the three unregistered them and put them in the hands of J. to sell. J. sold them and from time to time paid considerable sums into a bank to the account of the testator's estate, but ultimately absconded after misappropriating a considerable part of the proceeds. The dispositions of the testator's will were such that the sale could not be treated as an unauthorized act, and the absconding of J. took place within eleven months after the death of the testator. The testator's children brought this action to make all three executors liable for the loss:—*Held*, that the unregistering the bonds and handing them to J. to sell were not "unnecessary" acts, and that the co-executors were not liable for J.'s misappropriation:—*Held*, further, that as J. was trusted by the testator, and his co-executors had no reason to suspect him, there had been no such delay in calling upon J. for an account as to make them liable.—Decision of Kekewich, J., affirmed. *In re* GASQUOINE, GASQUOINE *v.* GASQUOINE [C. A. 470

**FALSA DEMONSTRATIO**—Construction of will *See* WILL. 4. [316

**FIXTURES** — Machinery — Mortgage — Bill of sale - - - - - - 686
*See* BILL OF SALE.

**FOREIGN ACTION**—Injunction against proceedings—Winding up of company - 369
*See* COMPANY. 7.

**FOREIGN COMPANY**—Right to trade under foreign name - - - 537
*See* COMPANY. 4.

**FRAUD**—Statute of Limitations—Mortgage 599
*See* LIMITATIONS, STATUTE OF.

**GOODWILL**—Trade name - - - 569
*See* TRADE NAME.

**HEIRS**—Omission of words—Equitable estate—Estate for life - - - 661
*See* SETTLEMENT. 2.

**HUSBAND AND WIFE**—*Reversionary Interest of Wife—Malins' Act* (20 & 21 *Vict. c.* 57)—*Instrument "made after* 31 *Dec.* 1857"—*Will republished after the day.*] A testatrix, by will made before the 31st of December, 1857, bequeathed pecuniary and specific legacies, and gave her residuary estate to trustees in trust for conversion, and to hold the fund in trust for Mrs. W. for life, and after her death for her children. She declared that the "several pecuniary legacies," bequeathed to such persons as should be married women should be for their separate use. After the 31st of December, 1857, she made a codicil to her will by which she made a considerable increase in the amount of her pecuniary legacies, but did not otherwise affect the residuary estate. She died in 1866. In 1868 one of the daughters of Mrs. W., with the concurrence of her husband, by deed duly acknowledged, assigned her reversionary share in the residuary estate to a purchaser, treating herself as empowered by sect. 1 of Malins' Act to assign her interest:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that the assignor did not become "entitled under an instrument made after the 31st of December, 1857," for that she derived title under the will which was made before that date, and that the will and codicil could not for this purpose be treated as together forming one instrument which was not "made" until the codicil was executed:—*Held*, also, that her share of residue did not come within the words "pecuniary legacies," and, therefore, was not given to her separate use:—*Held*, therefore, that the share did not pass by the assignment. *In re* ELCOM. LAYBORN *v.* GROVER WRIGHT - - C. A. 303

2. —— *Will of Married Woman—Appointment—General Power—Separate Estate—"Debts or other liabilities"—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 3, 4; *s.* 4.] Under sect. 1, sub-sects. 3 and 4, and sect. 4 of the Married Women's Property Act, 1882, when read together, property appointed by a married woman by will under a general testamentary power becomes, on her death, liable for her "debts and other liabilities," even though she may have had no separate estate at the time she contracted them. *In re* ANN. WILSON *v.* ANN - - - - - - 509

**ILLEGITIMATE CHILD**—Construction of will *See* WILL. 5. [561

**IMPROVEMENTS** — Mansion-house — Settled Land Acts - - - - 485
*See* SETTLED LAND ACTS. 3.

**INCOME**—Interim—Vested legacies—Contingent annuity - - - - 678
*See* EXECUTOR. 4.

—— Power of appointment—Capital - 675
*See* POWER. 3.

**INCOME TAX**—Deduction of—Construction of will - - - - - 286
*See* WILL. 1.

**INCUMBRANCES**—Discharge of—Settled Land Act - - - - - 1
*See* SETTLED LAND ACTS. 1.

**INFANT**—*Maintenance Clause—Power or Trust—Direction to apply whole or part of Income "for or towards"—Maintenance—Discretion of Trustees—Jurisdiction of Court to interfere—Ability of the Mother.*] A testator declared that, from and after the decease or marriage again of his wife (who was tenant for life of the whole estate during widowhood, and also one of the trustees), his trustees should apply the whole, or such part as they should think fit, of the income of the expectant share of any child, for or towards the maintenance, education, or benefit of such child. The wife married again, whereupon her income was reduced to £4000 per annum; the testator's children, who were quite young, continued to

**INFANT**—*continued.*
reside with their mother, who maintained and educated them as formerly, though she had applied to her co-trustees to make her an allowance of £300 per annum, out of the testator's residuary estate, towards their maintenance. The co-trustees, in the exercise of their discretion, declined to make any such allowance. On an application by the infants for an order on the trustees to pay a reasonable sum for their future maintenance:—*Held*, that there was no absolute trust to apply the income to the maintenance of the infants, but a discretionary trust, equivalent to a power; and that the co-trustees having, in the bonâ fide exercise of their discretion, refused to make any allowance for maintenance, because they did not consider it necessary at present, or for the true benefit of the infants, the Court could not interfere to overrule their discretion, and that the application must therefore be refused.—*Wilson* v. *Turner* (22 Ch. D. 521) and *Tempest* v. *Lord Camoys* (21 Ch. D. 571, 576, n.) discussed and explained. *In re* Bryant. Bryant *v.* Hickley [324

2. —— *Maintenance — Specific Contingent Legacy—Right to Intermediate Income—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator, after appointing executors and trustees, bequeathed a sum of £4000 Victoria Stock, held by him at the date of his will and at his death, to his trustees, in trust for such of his grand-daughters as should survive him and attain the age of twenty-one years in equal shares; and devised and bequeathed the residue of his estate to the same trustees upon trusts for conversion and distribution as therein mentioned. The grand-daughters, who were infants, now applied for maintenance out of the income of this contingent specific legacy:—*Held*, following *In re Medlock* (55 L. J. (Ch.) 738), that the legacy being segregated and vested in trustees for the benefit of the object of the gift when the contingency happened, the grand-daughters, on attaining twenty-one, would be entitled to the intermediate income, and therefore that sect. 43, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881, as interpreted by *In re Dickson* (29 Ch. D. 331), applied, and the trustees had power to allow maintenance out of the income. —*Guthrie* v. *Walrond* (22 Ch. D. 573), distinguished.—Dictum of Jessel, M.R., in *Long* v. *Ovenden* (16 Ch. D. 694), corrected and explained. *In re* Clements. Clements *v.* Pearsall 665

—— Condition in settlement — Residence in mansion-house - - - 351
*See* Settlement. 1.

**INHERITANCE**—Omission of words of—Equitable estate - - - - 661
*See* Settlement. 2.

**INJUNCTION** — Circular warning trade — Infringement of trade-mark - - 347
*See* Contempt of Court.

—— Damages—Lord Cairns' Act - - 276
*See* Light.

**INTEREST**—*Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 6—*Set-off.*] Parties who had bought under liberty to bid, in a partition action, and had been allowed to set off part of the purchase-money

**INTEREST**—*continued.*
against their respective shares, were charged with interest at 3 per cent. on the amounts set off. *In re* Dracup. Field *v.* Dracup - - 59

—— Non-payment of—Costs - 413
*See* Practice. 2.

**INVESTMENT**—Trustee—Breach of trust 231, 425, 724
*See* Trustee. 1, 2, 3.

**JOINT TENANT**—*Covenant to settle after-acquired Property—Severance of Joint Tenancy.*] A covenant by an intended husband and wife to settle the wife's after-acquired property:—*Held*, to sever the wife's joint interest in personal estate created by a subsequent instrument. *In re* Hewett. Hewett *v.* Hallett - - 362

**JUDGMENT**—Estoppel by - - - 578
*See* Estoppel.

**LANDS CLAUSES ACT**—*Practice*—8 & 9 *Vict. c.* 18 —*Reinvestment—Costs — Scale Fee — Surveyor's Fee — Apportionment between several Parties — Form of Order.*] The general rule that the costs of a reinvestment in land, of funds paid into Court under the Lands Clauses Act by different public bodies, must be borne by these public bodies in equal shares, does not apply, where there is great inequality in the amounts of the different funds, to the scale fee payable on the purchase, and these costs, with the ad valorem stamp duty and surveyor's fee, will be apportioned rateably between the different public bodies: *Ex parte Governors of St. Bartholomew's Hospital* (Law Rep. 20 Eq. 369), followed to this extent.—*Ex parte Bishop of London* (2 D. F. & J. 14), and *Ex parte Governors of Christ's Hospital* (2 H. & M. 166) considered. *In re* Bishopsgate Foundation [185

**LEGACY**—Charge on real estate - - 693
*See* Executor. 3.

—— Contingent—Interim income - - 665
*See* Infant. 2.

—— Specific or demonstrative - - 491
*See* Will. 2.

**LEGAL ESTATE**—Purchaser—Priority - 25
*See* Vendor and Purchaser. 2.

**LIABILITY**—Executor for default of co-executor [470
*See* Executor. 5.

**LIEN**—For costs—Solicitor - - - 556
*See* Solicitor. 3.

**LIGHT**—*Injunction or Damages—Future Injury —Lord Cairns' Act*, 21 & 22 *Vict. c.* 27, *s.* 2—*Special Circumstances — Jurisdiction.*] In an action for an injunction to restrain the Defendant from further building so as to interfere with the Plaintiff's ancient lights, and for a mandatory injunction to compel him to pull down like buildings already constructed, the Plaintiff proved that if the Defendant's building was completed it would seriously interfere with his light; but he failed to prove that the commercial value of his premises, or the facility of letting them, would be materially affected. The premises of the Plaintiff and the Defendant were both leaseholds held under the same lessor, who had consented to the erection of the Defendant's

LIGHT—*continued.*

building:—*Held*, by Kekewich, J., that under the special circumstances the Court was justified in giving damages both for the completed and the threatened interference, instead of an injunction:—But *held*, by the Court of Appeal, that the Plaintiff, having proved his legal right to the light, and that the proposed building would infringe that right, and there being no special circumstances disentitling him to relief, he was entitled to an injunction as to the threatened building and to damages only as to the completed buildings.—Whether the Court has jurisdiction to give damages in respect of threatened injury, instead of an injunction, *quære.*—*Holland* v. *Worley* (26 Ch. D. 578) and *Aynsley* v. *Glover* (Law Rep. 18 Eq. 544) considered. MARTIN *v.* PRICE - - - - - C. A. 276

**LIMITATIONS, STATUTE OF**—*Mortgage—Sale—Agent—Fraud—Concealed Fraud—Trustee Trust Property—Cause of Action, Commencement of—"Still retained"—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] In 1878 the Defendants, the first mortgagees of property, sold under their power of sale, and employed S., a solicitor, to conduct the sale for them. S. received the sale moneys, and, after satisfying the Defendants' mortgage debt, retained the surplus sale moneys, falsely representing to the Defendants that he, S., had the authority of the Plaintiff, the second mortgagee, to receive the same. S. applied the surplus to his own use, and until March, 1891, concealed his fraud by continuing to pay the Plaintiff interest on the second mortgage as though it were still existing. In February, 1892, S. became bankrupt, when the true facts were discovered; whereupon the Plaintiff brought an action against the Defendants for an account of the sale moneys, and payment of what was due to him on his second mortgage:—*Held*, that the Plaintiff's claim was barred by the Statute of Limitations and sect. 8 of the Trustee Act, 1888, on the ground that his cause of action first accrued in 1878, when the Defendants committed an innocent breach of trust in allowing S. to receive the surplus sale moneys instead of handing them over to the Plaintiff, and not in 1892, when the Plaintiff discovered S.'s fraud; and that the Defendants were not liable under the exception in sect. 8 either as having been "party or privy" to the fraud of S., or as having "still retained" the money sought to be recovered, the money not having been actually in their hands or under their control at the commencement of the action:—*Held*, also, following *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (18 Q. B. D. 714), that the fraud of S. could not be regarded as the fraud of the Defendants—that is, as a fraud committed by S. as agent for them or for their benefit, so as to render them responsible notwithstanding they were innocent of the fraud.—The Trustee Act, 1888, has in no way altered the principles which determine the time at which a cause of action for breach of trust or concealed fraud accrues.—The exception in s. 8 of the Trustee Act, 1888, as to property "still retained" by the trustee, applies and is confined to cases in which at the date of the writ the trustee still retains—that is, has actually in his hands or under his control—the trust property, or the proceeds thereof, sought to be recovered.—*Blair* v. *Bromley* (2 Ph. 354) distinguished.—Romer, J., affirmed. THORNE *v.* HEARD - - - - - C. A. 599

—— Director of Company—Fiduciary relation *See* COMPANY. 2. [616

—— Trustee—Breach of trust - 231, 724 *See* TRUSTEE. 2, 3.

**LOCAL GOVERNMENT**—*Nuisance—Sewer becoming Insufficient by Increase of Drainage—Damage by Flooding—Urban Sanitary Authority—Liability to Action—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 21, 299.] In 1855 a municipal corporation made a sewer under a road within their district. Many years afterwards the owners of premises abutting on the road erected a brewery, and, in pursuance of sect. 21 of the Public Health Act, 1875, or the corresponding section of the Sanitary Act, 1866, connected the drainage of the brewery cellars with the sewers.—In 1891, 1892, and 1893, the cellars were damaged by floodings.—The floodings arose from the fact that by reason of the large increase in recent years in the number of buildings draining into the sewer, when very heavy falls of rain occurred, the sewer was too small to carry off the influx of water, and the pressure forced the contents of the sewer through the connections into the cellars.—The system of drainage originally adopted reasonably provided for the district and for the then probable increase of buildings which would have to drain into it.—There had been no negligence in constructing or maintaining the sewer, or in not providing a new sewer or sewage system:—*Held*, (1.) that the corporation were not liable as strangers and apart from any statutory duty; (2.) That, in the absence of negligence, the corporation were not liable under sect. 19 of the Public Health Act, 1875. STRETTON'S DERBY BREWERY COMPANY *v.* MAYOR OF DERBY - - - - 431

2. —— *Water Supply—"Street"—Private Road—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 54, 57, 308.] The Plaintiff was the owner of a private road in the W. district. The Defendants were the urban sanitary authority of the district, and had the control of the streets generally in that district, and also the power of supplying the inhabitants with water. The Defendants commenced, without the Plaintiff's consent, to break up his private road for the purpose of laying down water-mains. The Plaintiff brought an action for an injunction:—*Held*, by the Court of Appeal (A. L. Smith, L.J., dissenting), that the words "where the local authority have not the control of the streets," in sect. 57 of the Public Health Act, 1875, which forbids the laying down of pipes in any private road without the consent of the owner, are descriptive of a local authority who have not the control generally of the streets in their district, and had no application to the Defendants; and that the Defendants had power under sects. 16 and 54 of the Public Health Act, 1875, to lay down pipes in the Plaintiff's private road without his consent, making him proper compensation

**LOCAL GOVERNMENT**—*continued.*
under sect. 308 of the same Act.—A private road is a "street" within the meaning of sects. 16 and 54 of the Public Health Act, 1875.—The decision of Kekewich, J., in *Hill* v. *Wallasey Local Board* ([1892] 3 Ch. 117), reversed. HILL *v.* WALLASEY LOCAL BOARD - - - C. A. 133

**LORD CAIRNS' ACT**—Damages in lieu of injunction - - - - 276
*See* LIGHT.

**MACHINERY**—Trade fixtures—Mortgage—Bill of sale - - - - 686
*See* BILL OF SALE.

**MAINTENANCE**—Infant—Legacy - 324, 665
*See* INFANT. 1, 2.

**MANSION HOUSE**—Rebuilding—Annual rental [189
*See* SETTLED LAND ACTS. 2.

**MORTGAGE**—Solicitor—Profit costs - 218
*See* SOLICITOR. 4.

—— Statute of Limitations—Concealed fraud [599
*See* LIMITATIONS, STATUTE OF.

**MORTMAIN**—Gift by will - - - 297
*See* CHARITY.

**NAME**—Similarity of—Company - - 537
*See* COMPANY. 4.

—— Trade name - - - - 569
*See* TRADE NAME.

**NEW TRUSTEES**—Appointment of - 707
*See* TRUSTEE. 1.

**NOTICE**—Constructive—Purchaser of legal estate—Priority - - - - 25
*See* VENDOR AND PURCHASER. 2.

**NUISANCE**—Sewer becoming insufficient by reason of increased drainage—Liability of sanitary authority - - 133
*See* LOCAL GOVERNMENT. 2.

**OFFICIAL RECEIVER** — Debenture-holders' action - - - - 108
*See* COMPANY. 6.

**OPEN SPACES**—Disused burial ground - 454
*See* BURIAL GROUND.

**ORDER IN COUNCIL**—Disused burial ground [454
*See* BURIAL GROUND.

**ORDER OF COURSE**—Taxation of bill of costs—Second order - - - 503
*See* SOLICITOR. 1.

**OUTGOINGS**—Meaning of—Repairs—Salary of agent - - - - 164
*See* WILL. 6.

**PARTITION**—*Tenants in Common—Party Wall—Trespass—Mandatory Injunction—Reversioner.*] Notwithstanding the abolition of the writ of partition a tenant in common is entitled as of right to a partition of the property held in common, subject to the provisions for a sale contained in the Partition Act, 1868.—Order made at the instance of one of two tenants in common, against the wish of the other, for the partition, vertically and longitudinally, of a wall which separated the gardens of two adjoining houses.—The occupiers of a house and garden, No. 37, pulled down and rebuilt a wall which separated the garden from that of the adjoining house, No. 36, and in doing so they trespassed on the garden of No. 36 by placing in the soil of it foundations and footings of the new wall extending further into that garden than did those of the old wall. The house No. 36 was in the occupation of a tenant under a lease:—*Held*, that, the trespass being of a permanent nature, the owners of the reversion in fee in No. 36 could, though the tenant made no complaint, maintain an action in respect of the trespass. MAYFAIR PROPERTY COMPANY *v.* JOHNSTON - - - 508

—— Sale under Partition Act—Interest on purchase money - - - 59
*See* INTEREST.

**PARTNERSHIP**—*Action for Dissolution—Motion to Stay Proceedings—Arbitration—Return of Premium paid by a Partner—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4—*Partnership Act*, 1890 (53 & 54 *Vict*, *c.* 39), *s.* 40.] The arbitration clause in partnership articles provided for the reference to arbitration of any difference between the partners as to the construction of any of the articles, "or as to any division, act or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the said partnership or the affairs thereof," but made no express provision for the reference to arbitration of any question as to the return of the premium paid as the consideration for the partnership.—In a dissolution action by one of the partners against the other, the Plaintiff claimed (inter alia) a return of the premium he had paid to the Defendant; and the Defendant moved to stay all proceedings in the action and to refer the matters in dispute to arbitration:—*Held*, that the arbitrators would have power, under a reference, to award a dissolution of the partnership, and therefore the proper terms of such dissolution, including if necessary the return of the premium; and consequently that the proceedings in the action ought to be stayed.—*Tattersall* v. *Groote* (2 Bos. & P. 131) explained and distinguished. BELFIELD *v.* BOURNE [521

2. —— *Receipt of Share of Profits—Business carried on Jointly—Implied Agreement for Partnership—Land employed in Business—Conversion—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 1, 2, 20.] Under the Partnership Act. 1890, just as before that Act, though the receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, this is not to be regarded as a presumption which has to be rebutted by other circumstances; but all the circumstances must be considered, and an inference drawn from them as a whole, without attributing undue weight to any one of them.—Partners in a business borrowed money on the security of freehold premises of which they were tenants in common, and expended the money in adding a part of those premises to adjoining workshops in which the business was carried on and of which the partners were co-owners:—*Held*, that sect. 20, sub-sect. 3, of the Partnership Act, 1890, applied, and that

**PARTNERSHIP**—*continued.*
the addition to the workshops did not become partnership property so as upon the death of one of the partners to descend as personalty. DAVIS *v.* DAVIS - - - - - - 393
—— Liability of retiring partner—Payment of interest—Statute of Limitations - 724
*See* TRUSTEE. 2.
—— Partner receiving money on behalf of firm—Fiduciary character - - 343
*See* ARREST.
—— Solicitors—Firms having a common partner—Agency charges - - - 289
*See* SOLICITOR. 2.

**PAYMENT INTO COURT**—Admission by defendant - - - - - - 499
*See* PRACTICE. 5.

**PAYMENT OUT OF COURT**—Purchase-money under compulsory purchase—Costs
*See* PRACTICE. 1. [53, 450

**PETITION**—Winding-up—Ground for—Voluntary winding-up - - - 736
*See* COMPANY. 9.

**POWER**—*Appointment to Trustee for object of Power—Transfer of Fund to Trustee nominated by Donee of Power.*] By a marriage settlement a fund was vested in trustees, upon trust, after the death of the survivor of the husband and wife, for the children of the marriage at twenty-one or marriage, in such shares and in such manner as the husband and wife should by deed jointly appoint, with remainders over. There were six children of the marriage, all of whom attained twenty-one. The husband and wife executed a deed, by which they appointed that the trustees should, after the death of the survivor of the husband and wife, stand possessed of one-sixth part of the trust fund in trust for R. (one of the daughters), her executors and administrators, for her separate use. And it was declared that the appointment was made to her upon certain trusts for the benefit of E., another of the daughters:—*Held*, that the one-sixth part thus appointed ought not to be transferred to R., as trustee under the appointment, but ought to be retained by the trustees of the settlement.—*Bush* v. *Aldam* (Law Rep. 19 Eq. 16) followed. *In re* TYSSEN. KNIGHT-BRUCE *v.* BUTTERWORTH - - 56

2. —— *General Power of Appointment—Exercise by Will—Death of Appointee before Testator—Devolution of Appointed Property.*] A testatrix having, under a deed of settlement, a general power of appointment over certain real estate, gave all the real and personal estate which she might be possessed of or entitled to, or of which by virtue of any power or authority she was competent to dispose, "in manner following"; and then, after making certain specific devises and bequests in which she treated the subjects of her gifts as her own, she gave the property forming the subject of the power to her husband, and also made him her residuary legatee. Throughout her will she drew no distinction between property which belonged to her and property over which she had only a power of disposition. Her husband predeceased her:—*Held*, that she had indicated her intention that the power should be exercised, and that the property subject to it should be deemed hers for all purposes: and, consequently, that it went to her heirs, and not as in default of appointment under the settlement. COXEN *v.* ROWLAND - - - - 406

3. —— *Settlement—Construction—Power of appointing Income.*] A testamentary power of appointing the income of personal estate was given by deed. "Subject to such appointment" of the income, trusts of the capital were declared:—*Held*, that the power extended to the capital. *In re* L'HERMINIER. MOUNSEY *v.* BUSTON 675
—— Appointment of new trustees - - 707
*See* TRUSTEE. 1.
—— General testamentary—Married woman—Liability to her debts - - 549
*See* HUSBAND AND WIFE. 2.

**POWER OF SALE**—Duration of—Discretion of trustees - - - - 334
*See* WILL. 7.

**PRACTICE**—*Costs—Compulsory Purchase under Special Act—Payment of Purchase-money out of Court—Jurisdiction as to Costs where no Provision in Special Act—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.] Where an Act enabling a public body to take land compulsorily contains no provision as to the costs of payment out of Court of moneys paid in under the Act, the Court has under sect. 5 of the Supreme Court of Judicature Act, 1890, jurisdiction to order the public body to pay the costs of and incidental to a petition for payment out.—Judgment of Chitty, J., affirmed. *In re* FISHER [53, C. A. 450

2. —— *Costs—Interlocutory Order directing Payment of Costs—Non-payment—Interest as from Date of Order—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *ss.* 17, 18, 20—*Rules of Supreme Court*, 1883, *Order* XLII., *rr.* 14, 16.] An interlocutory order directing the payment of costs by one person to another comes within sect. 18 of the Judgments Act, 1838, and carries interest on the costs thereby awarded as from the date of such order. TAYLOR *v.* ROE - - - 413

3. —— *Damages—Assessment down to Time of Assessment—Continuing Cause of Action—Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 58.] "A continuing cause of action," within the meaning of Order XXXVI., rule 58, is a cause of action arising from the repetition of acts or omissions similar to those in respect of which the action is brought.—The Plaintiffs brought an action against the Defendants for permitting sewage to fall into and pollute a stream running through the Plaintiffs' land, and obtained judgment for a perpetual injunction and for damages. The Defendants continued to pollute the stream, and three years after the judgment the Chief Clerk assessed the damages sustained by the Plaintiffs, carrying the assessment down to the date of his certificate:—*Held* (affirming the decision of Chitty, J.), that there was a continuing cause of action, within the meaning of Order XXXVI., rule 58, and that the damages were rightly assessed down to the time of the assessment. HOLE *v.* CHARD UNION - - C. A. 293

**PRACTICE**—*continued.*

4. —— *Evidence abroad—Examination of Parties to the Suit—Application by Defendant—Discretion—Rules of Supreme Court*, 1883, *Order XXXVII., r.* 5.] In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the Court will not regard the case of a Defendant with the same strictness as the case of a Plaintiff who has chosen his own forum. ROSS *v.* WOODFORD - - - 38

5. —— *Payment of Money into Court—Admission by Defendant—Verbal Admission—Rules of Supreme Court*, 1883, *Order XXXII., r.* 6.] A defendant may be ordered to pay into Court money which he has verbally admitted to be in his hands or under his control.—Upon a motion that a Defendant might be ordered to pay into Court a sum of money which he had verbally admitted to be in his hands or under his control, an affidavit proving the admission was made by a clerk of the Plaintiffs' solicitors. A copy of the affidavit was served on the Defendant with the notice of motion, which stated that the affidavit would be read on the hearing of the motion. The Defendant did not answer the affidavit, and he did not appear on the hearing:—*Held*, that the Defendant must be ordered to pay the money into Court. *In re* BEENY. FRENCH *v.* SPROSTON - - - - - - 499

6. —— *Writ—Service out of Jurisdiction—Action for Execution of Trusts of Settlement—No Property within Jurisdiction—Rules of the Supreme Court*, 1883, *Order XI., r.* 1.] In order to bring a case within Order XI., rule 1 (*d*), which provides for service out of the jurisdiction of the writ in an action for the execution of the trusts of a written instrument of which the person to be served is a trustee, there must be, at the time when leave to effect such service is asked for, property subject to the trusts of the instrument actually situate within the jurisdiction, and not merely property which ought to be, or, if the trusts were duly executed, would be, so situate.—On an application to set aside service in such an action on the ground that when leave to serve out of the jurisdiction was obtained there was no property within the jurisdiction:—*Semble*, the service may possibly be held good if it be shewn that property has subsequently come within the jurisdiction. WINTER *v.* WINTER - - 421

—— Injunction or damages—Lord Cairns' Act
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—— Lands Clauses Act - - - 185
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**PRESUMPTION**—Partnership—Participation in profits - - - - 393
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**PROFIT COSTS**—Solicitor mortgagee - 218
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**PROFITS** — Participation in — Presumption of Partnership - - - 393
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**REAL ESTATE**—Charge of legacies on - 693
*See* EXECUTOR. 3.

**RECEIVER**—Debenture-holders' action - 108
*See* COMPANY. 6

**REDEMPTION**—Solicitor mortgagee—Covenant clogging redemption - -, 218
*See* SOLICITOR. 4.

**REGISTRATION**—Bill of sale - - 686
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**REINVESTMENT**—Lands Clauses Act - 185
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**REMOTENESS**—Power of sale - - 334
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**RENT**—Outgoings—Repairs—Agent's salary
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**RES JUDICATA**—Scotch judgment—Conflict of laws - - - - - 147
*See* EXECUTOR. 1.

**RESTRAINT OF TRADE**—*Contract—Breach—Agreement by Vendor of Business not to carry on or be in anywise "interested" in any similar Business—Business carried on by Wife of Vendor trading separately.*] An agreement by the vendor of a business not to "carry on or be in anywise interested in" a business of a similar character, is not broken if the vendor has an interest of a merely domestic or sentimental character in such a business, as, for example, where it is carried on by his wife with her separate estate trading separately from him. To constitute a breach of such an agreement he must have an interest, not necessarily in the profits of the business, but such as touches him directly, and gives him some right to interfere in the business, or some means of gaining an advantage from it.—The Defendant, who had been carrying on the business of a grocer under the style of "T. P. Hancock," sold the business to the Plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the Defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business there under the style of "Mrs. T. P. Hancock." The business was managed by the nephew, and the Defendant's wife took some part in carrying it on, but the Defendant took no part. The money necessary for carrying on the business was found by the wife out of her separate estate, and no money whatever was contributed by the Defendant, nor did he share in the profits in any way. He, however, assisted his wife in obtaining the lease of the shop in her own name, and, as she was disabled by rheumatism from writing, he wrote for her a circular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own, and introduced the nephew to some provision merchants, and attended at the bank when his wife opened the banking account for the business in her own name:—*Held*, that there had been no breach of the agreement by the Defendant. SMITH *v.* HANCOCK - - - 209

**ROAD**—Private road—Laying down water-pipes
*See* LOCAL GOVERNMENT. 2. [133

**RULES OF SUPREME COURT, Order XI., r. 1**
*See* PRACTICE. 6. [421

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—— Order XX., r. 1b - - - 68
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**SEPARATE ESTATE** — General testamentary power—Liability to duty - - 549
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**SETTLED LAND ACTS**—*Capital Money—Sale of Settled Land—Application of Proceeds—Discharge of Incumbrances*—45 & 46 *Vict. c.* 38, *s.* 21, *sub-s. ii.*; *s.* 22, *sub-ss.* 2, 5; *s.* 53.] A testator who died in 1878 devised his W. and S. estates to his son J. F. for life, with remainder to such of the children of J. F. as should attain twenty-one, and devised his residuary estate to J. F. absolutely. At the testator's death the W. estate was subject to a mortgage in fee; the S. estate was unincumbered. J. F., in 1887, sold part of the S. estate under the Settled Land Act, 1882, and by his direction the trustees under the Act applied the money in part discharge of the mortgage on W. J. F. died intestate in 1888, leaving only infant children. It was decided after his death that the contingent remainders as to the S. estate failed, but that as to the W. estate they did not. The unsold part of the S. estate thus became the absolute property of the eldest son and heir-at-law of J. F., who then claimed a charge on the W. estate for the proceeds of sale which had been applied in part discharge of the mortgage, on the ground that as the S. and the W. estate did not devolve in the same way, they were different settled estates, and capital money arising from one was not properly applied in paying off an incumbrance on the other:—*Held*, by North, J., that as the money had been applied by the direction of J. F., who ultimately became absolutely entitled to it, J. F.'s heir could not complain of the application, and was not entitled to a charge:—*Held*, on appeal, that there was only one settlement and one settled estate, and that the application, before the parts of that estate had devolved in different ways, of capital money arising from one part in discharging an incumbrance on another part of the estate was within the powers of the Act, and that J. F.'s heir was not entitled to any relief. *In re* FREME. FREME *v.* LOGAN [C. A. 1

2. —— *Capital Money—Mansion House—Rebuilding—Annual Rental*—53 & 54 *Vict. c.* 69, *s.* 13, *sub-s. iv.*] The alteration, reconstruction, and enlargement of a mansion-house where part of the house was unaltered and the walls of another part were utilised:—*Held*, to be a rebuilding under sect. 13, sub-sect. iv., of the Settled Land Act, 1890.—The "annual rental" of settled land within the meaning of the proviso *held* not to include anything in respect of any part of the land in the occupation of the tenant for life, but to include the amount of the rent usually paid for a farm for the moment unoccupied. *In re* WALKER'S SETTLED ESTATE - - - 189

3. —— *Capital Money—Improvements—Mansion House—Alterations and Additions with a view to Letting—New Roof—Main Entrance—Heating Apparatus*—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*] The providing of a heating apparatus and pipes, though rendering a mansion-house more comfortable and convenient for occupation, is not an "improvement" directly or by analogy authorized by the Settled Land Act, 1882, s. 25, neither is it an "addition to or alteration in the building" within the meaning of the Settled Land Act, 1890, s. 13, sub-s. ii. But the placing of a new roof on a house—not necessarily the mansion-house—in substitution for a worn-out one, and the re-arrangement of the main entrance are "alterations" within the meaning of sect. 13, sub-sect. ii., which, if reasonably necessary and proper, may be properly paid for out of capital money. *In re* GASKELL'S SETTLED ESTATES - - - 485

4. —— *Settlement by way of Trust for Sale—Married Woman restrained from Anticipation—Equitable Tenant for Life—Possession—Discretion of Court—General Leave to exercise Powers of Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7, *sub-s. ii.*—*Costs—Form of Order.*] The Court has a judicial discretion as to giving possession, upon proper terms, to an equitable tenant for life, and the Settled Land Acts afford additional ground for exercising this discretion in favour of the person having such extensive statutory powers.—A married woman, restrained from anticipation under a settlement by way of trust for sale, which conferred wide powers of management upon the trustees until sale, was held entitled, upon proper undertakings for the protection of the estate and the trustees being given, to be let into possession of the settled land, and to exercise all the powers conferred by the Acts on a tenant for life, except the power of sale and exchange; but as no complaint was made against the conduct of the trustees she was directed to pay the costs of the application. *In re* BAGOT'S SETTLEMENT. BAGOT *v.* KITTOE 177

**SETTLEMENT**—*Conditions subsequent requiring Residence in Mansion House—Gift over on "Refusal or Neglect" to Reside—Infant.*] A testatrix devised real estate, including a mansion-house, in strict settlement, and added a proviso directing that every person who, by virtue of the limitations thereinbefore contained, should become entitled to the possession or to the receipt of the rents of the estate should, within three months next after the death of the first tenant for life, reside in and

**SETTLEMENT**—*continued.*

occupy the mansion-house for nine months at the least in every year. And in case any person who should come into possession or receipt of the rents of the estate should "refuse or neglect" to reside in and occupy the mansion-house, then the limitation thereinbefore contained of the estate to the use of him or her so refusing or neglecting should cease, and the testatrix gave the estate to the person or persons next in remainder under the limitations in her will:—*Held*, that inasmuch as an infant has no power to choose his own place of residence, an infant who had become entitled under the will to the possession of the estate could not, if he did not reside in the mansion-house, be said to "refuse or neglect" to do so, and consequently that he was not bound by the condition, and the gift over could not take effect. PARTRIDGE *v.* PARTRIDGE - - - 351

2. —— *Equitable Estate in Fee—Limitations—No Words of Inheritance—Construction.*] An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.—*Meyler* v. *Meyler* (11 L. R. Ir. 522) approved. *In re* WHISTON'S SETTLEMENT. LOVATT *v.* WILLIAMSON - - - 661

3. —— *Wife's Property—Ultimate Trust for Next of Kin—Words "die without having been married"—Child.*] By a marriage settlement, the trust fund was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default, to pay the income to her for life, for her separate use, and after her death, for such persons as she should by deed or will appoint, and in default, in trust for the persons who, under the statutes for the distribution of intestates' estates, would, on her death, have been entitled thereto, if she had died possessed thereof intestate "and without having been married." The wife died, without having appointed, leaving one child of the marriage:—*Held*, that the trust funds went to the child.—*Emmins* v. *Bradford* (13 Ch. D. 493) not followed. STODDART *v.* SAVILLE - - - - 480

—— Costs of preparation—Lien of solicitor 556
*See* SOLICITOR. 3.

—— Covenant to settle after-acquired property—Wife's joint property - - 362
*See* JOINT TENANT.

—— Power of appointment - - - 675
*See* POWER. 3.

**SEVERANCE**—Joint tenancy - - 362
*See* JOINT TENANT.

**SEWER**—Insufficiency — Liability of sanitary authority - - - - 431
*See* LOCAL GOVERNMENT. 1.

**SHARES**—Agreement to take—Qualification of director - - - - - 528
*See* COMPANY. 3.

—— Paid up - - - - - 89
*See* COMPANY. 5.

—— Purchase of, in another company—Ultra vires act - - - - 616
*See* COMPANY. 2.

**SOLICITOR**—*Bill of Costs—Abortive Order of Course—Right to obtain Second Order of Course.*] On the 24th of October, 1893, a client obtained the common order of course to tax a bill of costs, which had been delivered to him by his solicitors on the 10th of May, 1893, and also to tax another bill alleged to have been delivered on the 27th of October, 1892. On the 29th of November, 1893, the Taxing Master gave notice that he had fixed the 7th of December for the taxation. The parties attended on that day, and the Taxing Master then held that the alleged bill of the 27th of October, 1892, was not really a bill of costs, but was only a list of disbursements, and that, as the order directed him to tax two bills, and there was in fact only one, he could not under the order tax that one. On a subsequent application to tax the solicitors' costs of the abortive order, the Master held that the order had become inoperative, because he had not extended the time fixed by the order for the making of his certificate, and that he had no jurisdiction to order the client to pay the costs of the proceedings. But he intimated that it would be fair for the client to pay the solicitors £2 2s. The solicitors then acting for the client afterwards offered to pay that sum, and, while the original solicitors were considering whether they would accept the offer, a second order of course was obtained to tax the bill of the 10th of May, 1893. This order was obtained without any mention of the former order. On a motion by the solicitors to discharge this order:—*Held*, that the order had been irregularly obtained, and that, after the first order had become abortive, the client was not entitled to obtain another order to tax the bill, except upon a special application and on the terms of paying the solicitors' costs of the former proceedings.—The order was not, however, discharged; but the Judge directed the Taxing Master to proceed under it to tax the bill, and also to tax the solicitors' costs of the former proceedings, and to bring those costs into account. *In re* TAYLOR, SONS & TARBUCK [503

2. —— *Bill of Costs—Agency Fees—Firms having a Common Partner—Rules of Supreme Court, 1883, Order LXV; App. N, "Close Copies."*] It is a settled rule in the Taxing Master's Office that where a London firm of solicitors and a country firm have a common partner, the London firm cannot be treated as agent for the country firm so as to be entitled to agency fees, but will be considered as transacting the business on its own account.—Where, therefore, in winding-up proceedings, a London firm acted for a country firm, each firm consisting of three partners, two of whom were the same in both firms:—*Held* (affirming the decision of Vaughan Williams, J.), that close copies and term fees could not be allowed on taxation.—As regards close copies, *held*, that the rule in App. N as to close copies did not give the Taxing Master a discretion as to allowing them, for that the rule only applied in cases of agency. *In re* BOROUGH COMMERCIAL AND BUILDING SOCIETY - - C. A. 289

3. —— *Bill of Costs—Marriage Settlement—Trusts—Lien.*] A solicitor preparing a marriage settlement on the instructions of the husband, and subsequently retaining it in his possession, has no lien upon it, as against the trustees, for his unpaid bill, but is bound to deliver it up to the

**SOLICITOR**—*continued.*

trustees upon their requesting him to do so.—*Re Gregson* (26 Beav. 87), not followed. *In re* LAWRANCE. BOWKER *v.* AUSTIN - - 556

4. —— *Bill of Costs—Mortgagee—Life Estate—Mortgage — Covenant for Payment of "all Moneys which may become owing to Mortgagee by Mortgagor" — Solicitor-Mortgagee — Income, Receipt of by Mortgagee—Agent—Partner of Solicitor-Mortgagee—Profit Costs—Clogging Redemption—Re-opening Settled Account.*] A solicitor-mortgagee cannot, in the absence of express agreement, charge the mortgagor with any profit costs, either for work done in respect of the mortgaged property as solicitor for the mortgagor, including the preparation of the mortgage to himself, or, where the mortgage is of a life interest, of collecting, receiving, and distributing the income as agent for the mortgagor: but, *semble*, this rule does not preclude a partner of the solicitor-mortgagee from receiving remuneration for his trouble: *In re Doody* ([1893] 1 Ch. 129).—A covenant in a mortgage of a life estate to the solicitor of the mortgagor for payment, not only of the specific sum advanced, with interest, but also of "every other sum of money which may hereafter be advanced or paid by the mortgagee to or on account of or become owing to the mortgagee by the mortgagor," does not include profit costs and charges of the mortgagee, either as solicitor to the mortgagor or as his agent, for receiving and distributing the income, such a covenant being, as regards profit costs and charges, void as clogging the equity of redemption; and the Court will give the mortgagor leave to surcharge and falsify settled accounts between the mortgagor and mortgagee, so far as regards such costs and charges, unless the mortgagee can prove that the mortgagor was at the time made fully acquainted with his legal rights in respect of those items. EYRE *v.* WYNN-MACKENZIE - - - - - - - 218

5. —— *Bill of Costs—Trustee—Professional Charges—Opening Settled Account.*] S. & S., the trustees and executors of a will, who were solicitors carrying on business in partnership and were authorized by the will to charge for professional business done by them for the estate, wound up the estate and sent an account to the five residuary legatees with a letter saying that, if they would call at the office of the executors on a day named, the executors would give them any explanations they might require, and would hand them over cheques for their shares of the residue. The account was not a complicated one, and among the items was, "Paid Messrs. S. & Co. costs relating to executorship and counsel's fees and payments made by them, £116 17*s.* 2*d.*" The ultimate balance shewn was £331 3*s.* 4*d.*, the bulk of the testator's property having been disposed of by specific bequests. The residuary legatees attended, signed at the foot of the account a memorandum, "We have examined and approve of the foregoing account," received cheques for their shares, and executed a release to the trustees and executors. The trustees and executors never informed the residuary legatees that they were entitled to have a bill of costs delivered, and to have it taxed if they thought fit. Nine years afterwards three of the residuary legatees brought an action to have it declared that the release was not binding on them, and to have a bill of costs delivered and taxed. On production of documents there were found in the costs ledger of the solicitors items which came to more than the amount charged for costs in their account, there was no evidence of excessive charge beyond a deposition by an experienced solicitor's clerk that in his opinion at least one-sixth would be taxed off the amount of costs appearing in the ledger, and there was no proof of error in the rest of the account. Romer, J., dismissed the action: —*Held*, on appeal, that although it was the duty of the solicitor trustees to have informed the residuary legatees that they were entitled to have a bill of costs, and if they thought fit to have it taxed or moderated, the omission to do so was not by itself a sufficient ground for opening a settled account; that in order to do so it was necessary to shew that injustice would be done by allowing the settled account to stand; that if excessive charges had been shewn the account must have been opened; but that as no error had been shewn the action had rightly been dismissed. *In re* WEBB. LAMBERT *v.* STILL - - C. A. 73

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*See* HUSBAND AND WIFE. 2.

46 & 47 Vict. c. 57, s. 64, sub-s. 1—*Patents, Designs, and Trade Marks* - 645
*See* TRADE-MARK. 3.

—— —— s. 72, sub-s. 2; s. 90 - - 61
*See* TRADE-MARK. 1.

—— —— ss. 72, 73 - - - 193
*See* TRADE-MARK. 2.

47 & 48 Vict. c. 18, s. 7, sub-s. ii.—*Settled Land Act* - - - - - - 177
*See* SETTLED LAND ACTS. 4.

47 & 48 Vict. c. 72, ss. 2, 3—*Disused Burial Grounds* - - - - 454
*See* BURIAL GROUND.

50 & 51 Vict. c. 32, ss. 2, 4, Sched.—*Open Spaces* - - - - 454
*See* BURIAL GROUND.

51 & 52 Vict. c. 50, s. 10, sub-s. 1—*Patents, Designs, and Trade Marks* - 645
*See* TRADE-MARK. 3.

—— —— s. 14 - - - - 61
*See* TRADE-MARK. 1.

—— —— ss. 14, 15 - - - 193
*See* TRADE-MARK. 2.

51 & 52 Vict. c. 59, ss. 1, 8—*Trustees* - 616
*See* COMPANY. 2.

—— —— s. 8 - - - - 724
*See* TRUSTEE. 2.

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*See* LIMITATIONS, STATUTE OF.

**STATUTES**—*continued.*

51 & 52 Vict. c. 59, ss. 4, 5, 6, 8 - - 231
*See* TRUSTEE. 3.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - 68
*See* ARBITRATION.

—— —— s. 4 - - - - 521
*See* PARTNERSHIP. 1.

53 & 54 Vict. c. 39, ss. 1, 2, 20—*Partnership*
*See* PARTNERSHIP. 2. [393

—— —— s. 40 - - - - 521
*See* PARTNERSHIP. 1.

53 & 54 Vict. c. 44, s. 5—*Judicature Act* 53,
*See* PRACTICE. 1. [450

53 & 54 Vict. c. 63, s. 8—*Companies (Winding-up)* - - - - - 444
*See* COMPANY. 8.

—— —— s. 15 - - - - 736
*See* COMPANY. 9.

53 & 54 Vict. c. 69, s. 13, sub-s. ii.—*Settled Land Act* - - - - 485
*See* SETTLED LAND ACTS. 3.

—— —— s. 13, sub-s. iv. - - - 189
*See* SETTLED LAND ACTS. 2.

54 & 55 Vict. c. 73, s. 9—*Mortmain and Charitable Uses* - - - 297
*See* CHARITY.

**STATUTORY POWERS**—Sanitary authority—Insufficiency of sewer - - 431
*See* LOCAL GOVERNMENT. 1.

**STAYING PROCEEDINGS**—Arbitration - 68
*See* ARBITRATION.

**STREET**—Private road—Laying water-pipes
*See* LOCAL GOVERNMENT. 2. [133

**TENANT FOR LIFE**—Equitable estate—Right of possession—Discretion of Court - 177
*See* SETTLED LAND ACTS. 4.

**TENANT IN COMMON**—Partition - - 508
*See* PARTITION.

**TITLE DEEDS**—Custody of—Trustees—Deposit with solicitor - - - 425
*See* TRUSTEE. 4.

**TRADE-MARK** — *Registration — Resemblance to another already on Register—"Calculated to deceive"—"Person aggrieved"—Expunging—User —Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 72, *sub-s.* 2, 90—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 14.] B. & Co. carried on business in London, as dealers in window-glass, which they purchased in Belgium and shipped to Australia and other colonies. In 1876 they registered as a trade-mark the device of a star, which they used in connection with their glass since 1875; and their glass was known in the trade by the designation of "Star Brand." The Respondents, a Belgian glass manufacturing company, in 1885 registered in Belgium, as a trade-mark for glass, the device of a red star, which they had used there since 1880. In 1890 they registered in England, as a trade-mark for window-glass, the words "Red Star Brand." They sent large quantities of glass to England in cases marked with a red star, but did not deal directly with the colonies. B. & Co. having discovered that glass

**TRADE-MARK**—*continued.*

was being sold in New Zealand under the description of "Red Star Brand" moved to expunge the Respondents' mark from the register:—*Held*, that if B. & Co. had been opposing the registration of the Respondents' mark, the Comptroller would have been justified in refusing to register it on the ground that it so nearly resembled B. & Co.'s mark as to be calculated to deceive. The entry on the register of the Respondents' mark was therefore made "without sufficient cause," and B. & Co., being "persons aggrieved" within the meaning of s. 90 of the Patents, Designs, and Trade Marks Act, 1883, were entitled to have it expunged from the register:—*Held*, also, that an injunction limited to user in the colonies, as granted in *Barber* v. *Manico* (10 Rep. Pat. Cas. 93) would not afford sufficient protection to B. & Co. *In re* THE TRADE-MARK OF LA SOCIÉTÉ ANONYME DES VERRERIES DE L'ETOILE - 61

2. —— *Registration—Resemblance to another previously registered—Trade-mark accepted for Registration but not actually registered—Renewed Application—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 72, 73—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 14, 15.] In 1887, application was made for the registration of a trade-mark for whisky. The mark consisted of a label which bore on it the device of a ship upon the sea, and also the words "Unco Guid." The Registrar allowed the application, and the mark was advertised in the Trade Marks Journal, but, in consequence of the omission of the applicant's agent to pay the registration fee, the mark was not actually registered. The applicant was ignorant of this omission, and believed that the mark had been registered, and in this belief he proceeded to use it in his trade. In 1893 he discovered that the mark had not been registered, and he then renewed his application for registration. The Registrar refused the application, on the ground that in 1889 another mark had been registered for whisky, to which he thought the first mark had such resemblance as to be calculated to deceive. The second mark consisted of a label which bore the device of two lions rampant standing on opposite sides of a bottle, and also the words "The Unco Guid." The owner of this mark had, when he applied for its registration, disclaimed any right to the exclusive use of the words. The owner of the first mark made a similar disclaimer:—*Held*, that, having regard to the disclaimers, there was no such resemblance between the two marks as was calculated to deceive, and that the first mark ought to be registered:—*Held*, also, that the non-completion of the registration under the first application was not a bar to the making of a second. *In re* LOFTUS' TRADE-MARK - 193

3. —— *Registration—"Somatose"—"Invented Word"—"Reference to Character or Quality of Goods"—Descriptive Word—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* 1—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.] A word cannot be registered as an "invented word" under clause (d) of sect. 10, sub-sect. 1, of the Patents, Designs, and Trade Marks Act, 1888 (the section substituted for sect. 64 of the Patents, Designs, and Trade Marks Act, 1883), if it has any "reference to the character or quality of the goods" within sub-sect. (e). The word "Somatose" (derived from the Greek "soma," Angl. "body"; genitive, "somatos") held not to be registrable, either as an "invented word" under sub-sect. (d) of the above sect. 10—"somat" being the root of many English words having reference to the body, and "ose" being a common English suffix—or as a word "having no reference to the character or quality of the goods" within sub-sect. (e), the Applicants having, when applying for registration, themselves described the article for which they proposed to use the word as applicable to the human body.—Decision of North, J., refusing application for registration, affirmed by the Court of Appeal (Lindley, Kay, and A. L. Smith, L.JJ.), Lindley, L.J., dissenting. *In re Meyerstein's Trade-mark* (43 Ch. D. 604) considered. *In re* FARBENFABRIKEN APPLICATION [C. A. 645

—— Circular warning the trade—Injunction 347
*See* CONTEMPT OF COURT.

**TRADE NAME**—*Business—Goodwill—Assignment in Gross—Infringement—Injunction.*] John Forrest, a watchmaker in London, used to mark the words "John Forrest, London," on the goods made by him. After his death, in 1871, his administratrix sold his business and goodwill to C. & Co., watchmakers in London. In 1874 C. & Co. granted to S. & Co., watchmakers in Liverpool, the sole right for seven years to put the words "John Forrest, London," on the watches they made. After the expiration of the license C. & Co. inscribed "John Forrest, London," on very few, if any, of their watches. In 1890 they assigned all their estate for the benefit of creditors, and their trustee sold their business to X., who carried it on; and at the same time the trustee purported to assign to T, a watchmaker at Coventry, "the name, title, and goodwill of John Forrest, London." In an action by T. to restrain a rival watchmaker in Coventry from selling watches inscribed "John Forrest, London":—*Held*, that the action could not be maintained, for that, assuming C. & Co. acquired in 1871 the right to inscribe "John Forrest, London," on their watches, they lost that right under the license to S. & Co., and never regained it:—*Held*, also, that even if anything was assigned to T. by the trustee of C. & Co., it was merely the right to use the name "John Forrest, London," unconnected with any business, and, being a mere assignment in gross, was invalid. THORNELOE *v.* HILL - - 569

**TRESPASS**—Permanent injury—Right of reversioner - - - - 508
*See* PARTITION.

**TRUSTEE**—*Appointment of New Trustees—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 31—"*Personal Representatives*" *of Surviving Trustee—Appointment of Special and General Executors by Will of Surviving Trustee—Probate granted to "general" Executors.*] Sect. 31 of the Conveyancing and Law of Property Act, 1881, does not enable a sole surviving trustee of a will to appoint by his will, in con-

**TRUSTEE**—*continued.*

inuation to himself, trustees of the will of the original testator—The sole surviving trustee of a will by his will appointed general executors, and also purported to appoint special executors, for the purpose of executing, in continuation to himself, the trusts of the will of the original testator. The general executors obtained a grant of probate of the will of the trustee to themselves as "general executors," without any reservation of power to the special executors to come in and prove, and proceeded by deed to appoint two persons to be trustees of the will of the original testator. Subsequently probate of the will of the trustee, limited to the trust estates of the original testator, was granted to the persons named as special executors:—*Held*, that the will of the trustee did not operate as an exercise of the power of appointing new trustees conferred by sect. 31 of the Conveyancing and Law of Property Act, 1881; but that as the general executors were, at the time when the deed of appointment was executed, in possession of a general grant of probate, which was the only probate then in existence, they were "personal representatives" of a last surviving trustee within the meaning of the section, and therefore the deed was a valid appointment of trustees. *In re* PARKER'S TRUSTS [707

2. —— *Breach of Trust—Authorized Investment—Loan to a Firm—Change in Firm—Continuation of Loan—Payment of Interest by Firm—Liability of Partners—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Bankrupt Trustee—Costs.*] A testator who died in 1870 by his will authorized his trustees to invest his personal estate "either by placing the same on deposit in the hands of the firm of B., T. & Co. should they be willing to receive it at interest," but if not, then upon usual securities with liberty "to call in, vary, and transpose investments." At the time of his death the testator had a sum of money on deposit with the firm, which his trustees continued after his death:—*Held*, that it was a breach of trust to continue the loan after a change took place in the members constituting the firm.—H. T. and W. T. were the members of the firm when the testator died. H. T. died in 1875, and then W. T. took over the business and admitted H. E. T. as a partner, and they carried it on until December, 1878, when H. E. T. retired. From 1878 to 1883, W. T., S. B. T., and A. T. carried on the business in copartnership, when W. T. retired; but his retirement was not gazetted. From 1883, S. B. T. and A. T. carried on the business until 1891, when it was turned into a limited company. From first to last the business was carried on in the name of B., T. & Co., and down to 1891 interest was regularly paid to the testator's estate on the loan by cheques drawn in the name of the firm:—*Held*, that as against W. T. the loan was not statute-barred, for that under the circumstances the payment of interest after his retirement by the continuing partners, must be taken to have been made by them on his behalf and as his agents. *In re* TUCKER. TUCKER *v.* TUCKER - 724

3. —— *Breach of Trust—Improper Investment—Extent of Liability—Lapse of Time—Action by*

**TRUSTEE**—*continued.*

*Cestui que Trust—Statute of Limitations—Impounding Interest of Beneficiary—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 4, 5, 6, 8.] The effect of sect. 8 of the Trustee Act, 1888, is that any action or proceeding to recover money or other property from trustees (being one to which no Statute of Limitations existing at the passing of the Act applies) is to be brought within six years from the time when the right of recovery accrued—In August, 1878, the trustees of a settlement committed an innocent breach of trust by investing trust money upon mortgage of property of insufficient value. The mortgagor paid the interest on the money advanced direct to the tenant for life until 1890.—In 1892 the tenant for life and the infant remaindermen brought an action against the trustees to compel them to make good the amount of the investment. It was conceded that so far as the infant Plaintiffs were concerned, the trustees were liable to make good the loss to the estate:—*Held*, by the Court of Appeal (affirming the decision of Kekewich, J.), that the right of action by the tenant for life against the trustees was barred after six years from the time when the investment was made; and that, although the payment of interest by the mortgagor direct to the tenant for life amounted in law to a payment by him to the trustees, and by them to the tenant for life, it was not an admission or acknowledgment which would take the case out of the statute.—In order to make a beneficiary liable under sect. 6 of the Trustee Act, 1888, in respect of an improper investment, it must be shewn not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust.—An investment of trust funds on mortgage of property of insufficient value was made by trustees at the instigation and request and with the consent in writing of the tenant for life; but it did not appear that he intended to be a party to any breach of trust, or to an investment on the property without inquiry, and in effect he left it to the trustees to determine whether the investment was a proper one for the moneys proposed to be advanced:—*Held*, on the evidence, by the Court of Appeal (reversing the decision of Kekewich, J.), that the trustees were not entitled under sect. 6 of the Trustee Act of 1888 to have the life interest of the tenant for life impounded by way of indemnity to them against their liability for the loss to the estate by reason of the improper investment:—And *held*, also, that during the life of the tenant for life he was entitled to receive the income of so much of the trust fund as was not lost, and the trustees were entitled to retain for their own use the interest of the money paid by them to make good to the trust fund the amount of the loss.—*Per* Kekewich, J.:—The words "believed to be" in sect. 4 of the Trustee Act, 1888, do not govern the words "instructed and employed independently of any owner of the property;" and, therefore, in order to entitle a trustee lending money on the security of property to the protection of the section, he must be able to shew that the surveyor or valuer on whose report he acted was in fact so instructed and employed. *In re* SOMERSET. SOMERSET *v.* EARL POULETT - - - - C. A. 231

TRUSTEE—*continued.*

4. —— *Investment — Mortgage — Building Estate—Title-deeds—Custody—Convertible Securities—Solicitor.*] Where a trust fund had been invested on a mortgage of a building estate, the development of which would involve frequent reference to the title-deeds, the trustees were held justified in depositing the deeds with their solicitor, instead of retaining them under their own exclusive joint control in a bank or elsewhere. —*Semble*, convertible securities, such as bonds payable to bearer, belonging to a trust, ought not as a general rule to be left in the custody of a solicitor or agent. FIELD *v.* FIELD - 425

—— Appointment to, in trust for object of power
*See* POWER. 1. [56

—— Devise—Extent of estate—Direction to pay debts - - - - 43
*See* WILL. 3.

—— Director of company—Statute of Limitations - - - - - 616
*See* COMPANY. 2.

—— Discretion—Maintenance of infant - 324
*See* INFANT. 1.

—— Right to custody of settlement—Lien of solicitor - - - - 556
*See* SOLICITOR. 3.

—— Solicitor—Professional charges - 73
*See* SOLICITOR. 5.

—— Statute of Limitations—Concealed fraud
*See* LIMITATIONS, STATUTE OF. [599

**ULTRÀ VIRES ACT**—Company—Investment in shares of another company - 616
*See* COMPANY. 2.

**USER**—Trade-mark—Injunction against user in the colonies - - - - 61
*See* TRADE-MARK. 1.

**VENDOR AND PURCHASER** — *Covenants for Title—Incumbrance—Defect of Title appearing in the Conveyance.*] A. P. agreed with the railway company for the sale to them in fee of land to which she derived title under the will of X., and whether she could make a good title depended on the construction of that will. The sale was completed by a deed which fully recited the will of X., and by which she conveyed the land in the same way as an owner in fee would have done, and entered into the usual covenants for title extending to the acts of X. as well as of herself. The purchase-money was paid to her. After her death her children claiming under the will of X. obtained judgment against the railway company for payment to them of the purchase-money which had been paid to her. The company then sued the representatives of A. P. under her covenant for title:—*Held* (overruling *Hunt* v. *White* (37 L. J. (Ch.) 326; 16 W. R. 478), by which Romer, J., had considered himself bound), that defects of title to the estate expressed to be conveyed by a purchase-deed, if they come within the terms of the covenants for title, are not to be excluded from their operation on the ground that they appear on the face of the conveyance or are

**VENDOR AND PURCHASER**—*continued.*

otherwise known to the purchaser:—*Held*, therefore, that the company were entitled to recover on the covenants. PAGE *v.* MIDLAND RAILWAY COMPANY - - - - - C. A. 11

2. —— *Defect of Title—Constructive Notice—Purchase of Legal Estate—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-s.* 2—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1.] L., the owner of four freehold houses, mortgaged them in fee for £1500 each. The mortgagees transferred their mortgage to B. in consideration of the principal and interest then due, amounting to £1579 1*s.* 5*d.* on each house. Two days afterwards B. sold the houses to H. M. for exactly the same sum as he paid for the transfer to himself, and conveyed them to H. M. in exercise of the power of sale in the mortgages, freed from the equity of redemption. H. M. soon afterwards mortgaged the four houses for £6000, and on her death her successor in title, E. M., sold the equity of redemption to L. for £2500, subject to the prior mortgage for £6000. Certain creditors of J., the original owner, who had recovered judgment in an action against him, and obtained equitable execution on his equity of redemption, brought an action against B. and E. M., impeaching the validity of the sale to H. M., and obtained judgment setting it aside as a fraudulent execution of the power of sale, and declaring the Plaintiffs entitled to a right of redemption. L. was not a party to the action, but on receiving notice of it he paid off the mortgage for £6000, and took a conveyance of the legal estate from the mortgagees. At the time when L. purchased the equity of redemption from E. M., he had no actual notice of any impropriety in the sale by B. to H. M., nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to shew that the purchase by H. M. was at an undervalue, and did he make any inquiries concerning the circumstances of the sale:—*Held* (affirming the decision of Stirling, J.), that L. was not affected by constructive notice of the impropriety of the sale, and that he was protected against the prior equitable interest of the Plaintiffs by his acquisition of the legal estate. BAILEY *v.* BARNES - C. A. 25

**VOLUNTARY WINDING-UP** - - 444, 736
*See* COMPANY. 8, 9.

**WATER SUPPLY**—Laying down Pipes—Private Road - - - - - 133
*See* LOCAL GOVERNMENT. 2.

**WILL**—*Construction—Deduction—Income Tax.*] A testator, after giving various legacies, directed his trustees, out of the income of his residuary estate, to pay certain annuities, "all the said annuities to be paid clear of all deductions whatsoever except income tax." By a codicil made five years afterwards, after varying many of the legacies and increasing the amount of one of the annuities, he proceeded: "And I expressly direct that every legacy and other interest as well derivable under my will as any codicil thereto shall be free of legacy duty and every other deduction":—*Held*, by North, J., that the annuities were not given free from income tax;

WILL—*continued.*

the case being distinguished from *Turner* v. *Mullineux* (1 J. & H. 334) by the fact that the expression in which income tax was treated as a deduction did not occur in the same instrument as that by which the annuities were directed to be free from all deductions:—*Held*, on appeal, that the testator must be taken to have had his will in his mind when he made his codicil, and to have used the word "deductions" in the same sense throughout; and that as by his will he had shewn that he understood the word to include income tax, the annuities must be paid free of income tax. *In re* BUCKLE. WILLIAMS *v.* MARSON - - - - - - C. A. 286

2. —— *Construction—Demonstrative or Specific Legacy.*] Legacy of "800 pounds invested in 2½ Consols" in a will where the context had some bearing on the point held specific, not demonstrative. *Mytton* v. *Mytton* (Law Rep. 19 Eq. 30) considered. *In re* PRATT. PRATT *v.* PRATT - - - - - - - 491

3. —— *Construction—Devise to Trustees—Extent of Estate—Direction to pay Debts—Contingent Remainder—Failure of particular Estate.*] A testatrix, who died in 1875, after directing her debts to be paid by her executors thereinafter named, specially devised a freehold messuage to her sons H. and W. and their heirs, upon trust to allow the said H. to use and enjoy the same for his life, and after his decease upon trust for all and every one or more of the children of the said H. as he should by deed or will appoint, and in default of appointment in trust for all and every one or more of the children of the said H. who being sons should attain twenty-one, or being daughters should attain that age or marry, and appointed her said sons H. and W. her executors. H. having died in 1892, without having exercised the power of appointment, leaving two children, infants and unmarried, the question was whether the remainder to the children was a legal contingent remainder which had failed for want of a freehold to support it, or whether the legal estate in fee was vested in the devisees and executors:—*Held*, that the direction to pay debts was sufficient to shew that the testatrix did not mean to avail herself of the machinery of the Statute of Uses in the specific devise to her sons and their heirs, or to make them mere conduit pipes of the legal estate, but that she intended that the legal estate should pass to, and not through, them "in trust" according to the modern signification of the term, and consequently that the estates given to the infants were equitable and did not fail. *Creaton* v. *Creaton* (3 Sm. & Giff. 386), *Spence* v. *Spence* (12 C. B. (N.S.) 199), and *Marshall* v. *Gingell* (21 Ch. D. 790) considered and applied. *In re* BROOKE. BROOKE *v.* BROOKE - - 43

4. —— *Construction—Falsa Demonstratio—Limitatio vera.*] S. devised to his wife during widowhood "my residence called S. House and premises thereto as the same are now occupied by me." Some years before making this devise he had let to two of his sons for the purposes of their business, an office standing in the yard of S. House and the stable and coach-house belonging to the house, except a room on the first floor of the coach-house to which the only access was through the house and the sons were in occupation till his death:—*Held* (affirming the decision of Chitty, J.), that the devise included the room over the coach-house, but did not include the rest of the stable and coach-house nor the office, for that the property which was in the testator's own occupation answered the whole of the description, and that being so, the Court could not enter into the question of inconvenience, and reject the reference to occupation as falsa demonstratio.—*Travers* v. *Blundell* (6 Ch. D. 436) distinguished.—*Stanley* v. *Stanley* (2 J. & H. 491) observed upon. *In re* SEAL. SEAL v. TAYLOR [C. A. 316

5. —— *Construction—Illegitimate Children—Gift to "Children" of Person described as "Wife."*] A testator bequeathed his residuary estate in trust for his four children by name, including "A. J. H. the wife of J. H.," and declared that his trustees should stand possessed of the share thereinbefore given to the said A. J. H., upon trust to invest the same and pay the income to the said A. J. H. during her life, and so that "during any coverture" she should not have power to anticipate the same, and, after her death, in trust for "the children or child of the said A. J. H.," who being a son or sons should attain twenty-one, or being a daughter or daughters, attain that age or marry, and if more than one, equally. J. H. had married a sister of the testator, who died in the testator's lifetime, and after her death had gone through the ceremony of marriage with the testator's daughter A. J., and had had a child by her. The testator was aware of these facts. After the death of the testator, two other children of J. H. by the testator's daughter A. J. were born. She afterwards died:—*Held*, on the authority of *In re Horner* (37 Ch. D. 695), that the child born before the date of the will was entitled to the share. *In re* HARRISON. HARRISON *v.* HIGSON - 561

6. —— *Construction—Rents—Outgoings.*] A testator devised estates to uses in settlement, and bequeathed to the person who should at his death become entitled to possession, all arrears of rent which might be due to his estate at his death, and all proporotions to become due to his estate after his death, of rents accruing due at but payable after his death, "but so, nevertheless, that all outgoings of the said hereditaments properly chargeable against such arrears and proportions, and not discharged in my lifetime, shall be paid out of such arrears and proportions":—*Held*, by Kekewich, J., that the outgoings chargeable against the arrears and proportions of rents included only rates, taxes, tithes, tithe-rent charge and other outgoings (if any), which were recoverable by process of law as against or in respect of the hereditaments out of which such rents had been derived, and did not include agent's salary, or the costs of any repairs or improvements, or wages of workmen employed on the estates, notwithstanding that it might have been the practice of the testator to debit the same to the particular parts of the estates in respect of which such expenditure was incurred:—*Held*, on appeal, that the outgoings properly chargeable against the

**WILL**—*continued.*

arrears and proportions of rent included all such expenses due and remaining unpaid at the testator's death, as in the ordinary course of management as carried on by him, would, at his death, come into charge against such arrears and proportions. *In re* DUKE OF CLEVELAND'S ESTATE. VISCOUNT WOLMER *v.* FORESTER - C. A. 164

7. —— *Settlement—Power of Sale—Tenant for Life—Limitations over—Discretion—Duration—Intention of Testator or Settlor — Remoteness.*] Where in a deed or will there is a limitation of real and personal estate to one for life, and upon the death of the tenant for life upon trust to divide amongst certain persons, with power or authority to the trustees to sell, at such times as they shall think fit, all or any portion of such real and personal estate, such power of sale is not void as infringing the law against perpetuities, but may be exercised within a reasonable time after the death of the tenant for life, and after the property has become absolutely vested in possession, if on the construction of the particular instrument it appears to be the intention of the settlor or testator that it should be then exercised. —Dictum of Jessel, M.R., in *Peters* v. *Lewes and East Grinstead Railway Company* (18 Ch. D. 429), approved of and followed. *In re* LORD SUDELEY AND BAINES & CO. - - 334

—— Appointment under general power—Devolution of property - - - 406
*See* POWER. 2.

—— Charge of legacies—Residuary real estate
*See* EXECUTOR. 3. [693

**WILL**—*continued.*

—— Gift to charity—Mortmain Act, 1891 297
*See* CHARITY.

—— Interim income—Vested legacies—Contingent annuities - - - 673
*See* EXECUTOR. 4.

—— Republication—Codicil—Whether will and codicil are one instrument - 303
*See* HUSBAND AND WIFE. 1.

**WINDING-UP**
*See* Cases under COMPANY.

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